Supreme Court, U.S.
FILED

10103 4 FEB 15 2011

OFFICE OF THE CLERK

No. 10-1034

In the Supreme Court of the United States

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, DR. RICHARD SONNENSHEIN, and VALERIE MEEHAN,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN, in his official capacity as President, Board of Supervisors for San Francisco, and TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors for San Francisco,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001
rmuise@thomasmore.org

Attorney for Petitioners

February 15, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

An *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit was presented with the question of whether an official resolution (Resolution 168-06) unanimously passed by the Board of Supervisors for the City and County of San Francisco that *expressly* condemned the religion of its Catholic citizens violates the Establishment Clause.* In a fractured opinion, *three* judges found that Petitioners had standing and should prevail on the merits; *three* judges found that Petitioners had standing and should not prevail on the merits; and *five* judges found that Petitioners lacked standing and thus did not reach the merits of the Establishment Clause claim.**

1. Whether the Court's modern Establishment Clause jurisprudence involving government speech—whether explicit or symbolic—is unworkable and leads to inconsistent results such that a substantial revision is necessary to ensure uniformity of decisions by the lower courts.

---

* Resolution 168-06 is set out in full on pages 2, 3, and 4 of this petition.

** The confusion over standing is a direct result of the flawed jurisprudence that produced it. Indeed, "offended observer" standing is made possible by the endorsement test, which Justice O'Connor created in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *But see Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.").

2. Whether a double standard exists for Establishment Clause challenges to government speech that disfavors religion, requiring the Court to resolve the conflict by clarifying its jurisprudence and setting forth the appropriate test for such cases.

3. Whether the Court should summarily reverse the *en banc* decision because it directly and sharply conflicts with controlling law and perpetuates a regrettable perception that the Establishment Clause is hostile toward religion.

PARTIES TO THE PROCEEDING

The Petitioners are Catholic League for Religious and Civil Rights, Dr. Richard Sonnenshein, and Valerie Meehan ("Petitioners").

The Respondents are City and County of San Francisco ("San Francisco" or "City"), Aaron Peskin, in his official capacity as President, Board of Supervisors for San Francisco, and Tom Ammiano, in his official capacity as a Supervisor, Board of Supervisors for San Francisco ("Respondents").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED .. 1

STATEMENT OF THE CASE 1

A. The Petitioners. 1

B. The Challenged Resolution. 2

C. The Procedural Posture of the Case. 6

REASONS FOR GRANTING THE PETITION ... 6

I. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO "SILLY" RESULTS THAT ARE INCONSISTENT WITH OUR NATION'S HISTORY AND TRADITIONS. 6

A. THE COURT SHOULD ADOPT A RATIONAL BASIS STANDARD OF REVIEW FOR GOVERNMENT "RELIGIOUS" SPEECH THAT IS REASONABLY

RELATED TO OUR NATION'S HISTORY AND TRADITIONS. 13

B. THE COURT SHOULD ADOPT A STRICT SCRUTINY STANDARD OF REVIEW FOR GOVERNMENT "RELIGIOUS" SPEECH THAT IS NOT REASONABLY RELATED TO OUR NATION'S HISTORY AND TRADITIONS. 17

II. THE *EN BANC* DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER CIRCUIT COURTS, AND IT PRESENTS AN ISSUE OF NATIONAL IMPORTANCE. 19

A. THE ESTABLISHMENT CLAUSE SHOULD NOT TOLERATE GOVERNMENT SPEECH THAT EXPRESSLY DISFAVORS RELIGION. . . 19

B. THE *EN BANC* DECISION DIRECTLY AND SHARPLY CONFLICTS WITH ESTABLISHED PRECEDENT AND PROMOTES A PERCEPTION THAT THE LAW IS HOSTILE TOWARD RELIGION. . 21

CONCLUSION 27

APPENDIX

Appendix A: Opinion, United States Court of Appeals for the Ninth Circuit, (October 22, 2010) 1a

Appendix B: Order, United States Court of Appeals for the Ninth Circuit, (November 5, 2009) 84a

Appendix C: Opinion, United States Court of Appeals for the Ninth Circuit, (June 3, 2008) 86a

Appendix D: Memorandum and Order/ Judgment, United States District Court, Northern District of California, (November 30, 2006) 115a

TABLE OF AUTHORITIES

CASES

ACLU v. Mercer Cnty.,
432 F.3d 624 (6th Cir. 2005) 11, 24

ACLU v. Schundler,
168 F.3d 92 (3d Cir. 1999) 10

Am. Family Ass'n v. City & Cnty. of San Francisco,
277 F.3d 1114 (9th Cir. 2002) 23

Am. Jewish Congress v. Chicago,
827 F.2d 120 (7th Cir. 1987) 10

Bauchman v. West High Sch.,
132 F.3d 542 (10th Cir. 1997) 11

Borden v. Sch. Dist. of E. Brunswick,
523 F.3d 153 (3d Cir. 2008) 16, 25

Busch v. Marple Newtown Sch. Dist.,
567 F.3d 89 (3d Cir. 2009) 25

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) ..... *passim*

Commack Self-Service Kosher Meats, Inc. v. Weiss,
294 F.3d 415 (2d Cir. 2002) 18

Comm. for Pub. Educ. & Religious Liberty v. Nyquist,
413 U.S. 756 (1973) 22

Cnty. of Allegheny v. ACLU,
492 U.S. 573 (1989) ..... i, 6, 22

Doe v. Duncanville Indep. Sch. Dist.,
994 F.2d 160 (5th Cir. 1993) 10

Doe v. Duncanville Indep. Sch. Dist.,
70 F.3d 402 (5th Cir. 1995) 24

Edwards v. Aguillard,
482 U.S. 578 (1987) 9, 19, 22

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 9, 12, 15

Epperson v. Arkansas,
393 U.S. 97 (1968) 19

Green v. Haskell Cnty. Bd. of Comm'rs,
574 F.3d 1235 (10th Cir. 2009) ... 10, 11, 13, 24

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 7, 12, 15

Larson v. Valente,
456 U.S. 228 (1982) 18

Lee v. Weisman,
505 U.S. 577 (1992) 8

Lynch v. Donnelly,
465 U.S. 668 (1984) ..... *passim*

Marsh v. Chambers,
463 U.S. 783 (1983) 12, 13, 14

McCreary Cnty. v. ACLU of Ky.,
545 U.S. 844 (2005) 10, 12

McGowan v. Maryland,
366 U.S. 420 (1961) 14

Murray v. City of Austin,
947 F.2d 147 (5th Cir. 1991) 24

Nurre v. Whitehead,
580 F.3d 1087 (9th Cir. 2009) 24

O'Connor v. Washburn Univ.,
416 F.3d 1216 (10th Cir. 2005) 24

Roberts v. Madigan,
921 F.2d 1047 (10th Cir. 1990) 16

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 6, 22

Salazar v. Buono,
130 S. Ct. 1803 (2010) 12

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 19, 25, 26

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 25

Stratechuk v. Bd. of Educ.,
587 F.3d 597 (3d Cir. 2009) 16, 23

Trunk v. City of San Diego,
Nos. 08-56415, 08-56436, 2011 U.S. App. LEXIS
53 (9th Cir. Jan. 4, 2011) 9

Van Orden v. Perry,
545 U.S. 677 (2005) ..... *passim*

Vasquez v. Los Angeles Cnty.,
487 F.3d 1246 (9th Cir. 2007) 16, 23

Vernon v. City of Los Angeles,
27 F.3d 1385 (9th Cir. 1994) 23

Wallace v. Jaffree,
472 U.S. 38 (1985) 13

Widmar v. Vincent,
454 U.S. 263 (1981) 17

Zorach v. Clauson,
343 U.S. 306 (1952) 13, 14

CONSTITUTION

U.S. Const. amend. I ..... *passim*

STATUTE AND RESOLUTION

28 U.S.C. § 1254(1) 1

S.F. Res. No. 168-06 (Mar. 21, 2006), available at
http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions06/r0168-06.pdf ..... i, 2, 4

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The *en banc* opinion, App. 1a, appears at 624 F.3d 1043.

JURISDICTION

The opinion of the *en banc* court was issued on October 22, 2010. An application filed by Petitioners to extend the time to file the present petition from January 20, 2011 to February 17, 2011, was granted by Justice Kennedy on January 5, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. The Petitioners.

Petitioner Catholic League for Religious and Civil Rights is the Nation's largest Catholic civil rights organization. Founded in 1973, the Catholic League defends the right of Catholics—lay and clergy alike—to participate in American public life without defamation or discrimination. The Catholic League has approximately 6,000 members who reside in San Francisco. Petitioner Richard Sonnenshein is a resident of San Francisco, a Catholic, and a member of

the Catholic League. Petitioner Valerie Meehan is a resident of San Francisco, a third-generation San Franciscan, and a Catholic.

B. The Challenged Resolution.

Petitioners challenge the constitutionality of Resolution 168-06, which the San Francisco Board of Supervisors unanimously adopted on March 21, 2006. The challenged resolution reads in full as follows:

> **Resolution urging Cardinal William Levada, *in his capacity as head of the Congregation for the Doctrine of the Faith* at the Vatican, *to withdraw his discriminatory and defamatory directive* that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.**
>
> WHEREAS, It is *an insult to all San Franciscans* when ***a foreign country, like the Vatican***, *meddles with and attempts to* ***negatively influence*** *this great City's existing and established customs and traditions* such as the right of same-sex couples to adopt and care for children in need; and
>
> WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would

actually mean doing violence to these children" ***are absolutely unacceptable to the citizenry of San Francisco***; and

WHEREAS, Such ***hateful*** *and* ***discriminatory*** rhetoric is both ***insulting*** *and* ***callous***, and shows a level of ***insensitivity*** *and* ***ignorance*** which has *seldom been encountered by this Board of Supervisors*; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, *Cardinal Levada is* ***a decidedly unqualified representative*** *of his former home city, and* ***of the people of San Francisco*** *and the values they hold dear*; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco *to* ***defy*** *all* ***discriminatory directives*** *of Cardinal Levada*; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, *in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (****formerly known as Holy Office of the Inquisition****)*, to withdraw his ***discriminatory*** *and* ***defamatory*** directive that Catholic Charities of the

> Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.[1]

It is important to bear in mind that the "discriminatory directive" that was the subject of this resolution was from the Congregation for the Doctrine of the Faith to a Catholic organization. It was not directed to the City, any other governmental entity or agency, or other private party.

Petitioners object to and have been injured by the anti-Catholic resolution adopted by the City. The City's resolution attacks Petitioners' deeply held religious beliefs, conveys an impermissible, government-sponsored message of disapproval of and hostility toward the Catholic religion, and sends a clear message to Petitioners that they are outsiders, not full members of the political community. App. 7a.

Petitioners Sonnenshein and Meehan have had direct contact with and have been injured by the offending resolution, which stigmatizes Petitioners on account of their religious beliefs. Petitioners Sonnenshein and Meehan, who are citizens and municipal taxpayers of San Francisco, have been injured by the abuse of government authority and the misuse of the instruments of government to criticize, demean, and attack their religion and religious beliefs, thereby chilling their access to the government. As a result of the City's anti-Catholic resolution, Petitioners

---

[1] S.F. Res. No. 168-06 (Mar. 21, 2006), available at http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions06/r0168-06.pdf. (emphasis added).

Sonnenshein and Meehan have and will continue to curtail their activities to lessen their contact with Respondents, thereby causing further harm. Petitioner Catholic League, through its members, has been similarly injured and harmed by Respondents' actions. *See* App. 43a.

The effect of the City's anti-Catholic resolution, which remains posted on the City's official website, is the same as posting a large sign on the front door to city hall reading, "Catholics are not welcome in San Francisco." *See* App. 16a-17a, n.33 ("The government [cannot] condemn religion by erecting a gigantic sign on city hall of a cross with a line through it: a 'no Christianity' sign with the design of a 'no smoking' sign. The Board's resolution accomplishes the same thing as the aforementioned sign, but even more plainly and unambiguously.").

As summarized by Circuit Judge Kleinfeld:

> Pope Paul III established the Congregation for the Doctrine of the Faith a half millennium ago. It safeguards and promotes Catholic doctrine on faith and morals. In 2003, the Congregation addressed homosexual marriage and adoption, concluding that both were immoral, and that it was the moral duty of Catholics to oppose both. To carry out this doctrinal decision, Cardinal William Joseph Levada directed the Archdiocese of San Francisco that Catholic agencies should not place children for adoption in homosexual households. San Francisco immediately responded with official hostility. The San Francisco Board of Supervisors adopted the resolution giving rise to this lawsuit. The

> resolution urges the Cardinal to withdraw his instructions; denounces the Cardinal's directive as "meddl[ing]" by a "foreign country"; calls it "hateful," "insulting," and "callous"; and urges the local archbishop and Catholic Charities to "defy" the Cardinal's instruction.

App. 4a-5a.

C. The Procedural Posture of the Case.

Petitioners sued the City, claiming that this official government resolution violates the Establishment Clause. The district court dismissed the lawsuit for failure to state a claim upon which relief could be granted, App. 115a-138a, and a panel of the Ninth Circuit initially affirmed, App. 86a-114a. The Ninth Circuit then voted to rehear the case *en banc*, App. 84a-85a, and affirmed the district court's dismissal on differing grounds, as noted previously, App. 1a-83a.

REASONS FOR GRANTING THE PETITION

I. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO "SILLY" RESULTS THAT ARE INCONSISTENT WITH OUR NATION'S HISTORY AND TRADITIONS.

The Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring in the judgment), and in need of "[s]ubstantial revision," *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part). *See also*

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

This case is a "poster child" for the inconsistent results caused by the Court's muddled Establishment Clause case law. Thus, it provides an opportunity to abandon this unworkable jurisprudence in favor of one that respects our Nation's religious heritage, history, and traditions and that eschews the "crooked lines and wavering shapes" produced by the status quo. Unfortunately, under the current jurisprudence, the closest measure for predicting the outcome of a particular case is the personal predilections of the judge or judges deciding it. *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) ("The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections.").

While a majority of the *en banc* Court found that Petitioners had standing to advance their Establishment Clause claim,[2] that ruling is hollow comfort given the fact that the circuit court also confirmed the constitutionality of the City's anti-

---

[2] As Circuit Judge Kleinfeld noted in his majority opinion on standing, "It would be outrageous if the government of San Francisco could condemn the religion of its Catholic citizens, yet those citizens could not defend themselves in court against their government's preferment of other religious views." App. 8a.

Catholic resolution. This ruling on the merits is troubling given that under this Court's extant jurisprudence, "a mere message of disapproval, even in the absence of any coercion,[3] allegedly suffices for an Establishment Clause violation under *Lemon*." *See* App. 27a; *see Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor J., concurring in the judgment) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.").

As Circuit Judge Kleinfeld appropriately observed:

> The "message" in the resolution, unlike, say, the message that might be inferred from some symbolic display,[4] is *explicit*: a Catholic doctrine

---

[3] Though not yet adopted by a majority opinion from this Court, a test focusing on actual legal coercion, rather than endorsement, would perhaps be more faithful to the original meaning of the Establishment Clause. *See Van Orden*, 545 U.S. at 693 (Thomas, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 640-43 (1992) (Scalia, J., dissenting). Indeed, coercion could be found here as between the City and the Archdiocese of San Francisco, to which Petitioners, as Catholics, are members. Nevertheless, as the Court's jurisprudence currently stands, the endorsement enquiry does not require coercion.

[4] It is perhaps ironic (and no doubt tragic for the family members of the servicemen and servicewomen who are honored by the Mt. Soledad war memorial) that the Ninth Circuit recently held unconstitutional the longstanding display of a cross atop Mt.

> duly communicated by the part of the Catholic church in charge of clarifying doctrine is "hateful," "defamatory," "insulting," "callous," and "discriminatory," showing "insensitivity and ignorance," the Catholic Church is a hateful foreign meddler in San Francisco's affairs, the Catholic Church ought to "withdraw" its religious directive, and the local archbishop should defy his superior's directive. This is indeed a "message of . . . disapproval." And that is all it takes for it to be unconstitutional.

App. 27a-28a (emphasis added).

Justice Thomas summed it up best in his concurring opinion in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1 (2004) "Our jurisprudential confusion has led to results that can only be described as *silly*." (Thomas, J., concurring in the judgment) (emphasis added); *see also Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence").

Indeed, inconsistent results—results which tend to disfavor religion and thus call into question the very

---

Soledad in San Diego, California—a *passive* symbol that is an integral part of a national war memorial. *See Trunk v. City of San Diego*, Nos. 08-56415, 08-56436, 2011 U.S. App. LEXIS 53 (9th Cir. Jan. 4, 2011). As Circuit Judge Kleinfeld accurately noted in the present case, "Symbols endorsed or adopted by a government are often ambiguous, but the words in this resolution are not." App. 16a-17a, n.33.

foundation of the Court's jurisprudence[5]—in the inferior federal courts can be directly attributed to the insufficient and inconsistent guidance given to them by this Court. *See, e.g., ACLU v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (dissent) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has secular elements, no matter how trivial, open to judicial approval."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence."); *Am. Jewish Congress v. Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting) ("It would be appalling to conduct litigation under the Establishment Clause as

---

[5] *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting) ("Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century."); *see also Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1236 n.2 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing *en banc*) ("A mode of analysis that ignores this tradition of acknowledgment, and the original understanding of the Establishment Clause that it suggests, is suspect at best.").

if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane."); *Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective."); *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing *en banc*) ("[U]ntil our superiors speak, we leave the state of the law "in Establishment Clause purgatory.") (quoting *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005)).

This case presents an opportunity for the Court to revise its Establishment Clause jurisprudence in cases involving government speech in the context of reviewing *for the first time* a case involving speech that disfavors religion. *See* App. 20a ("We have not found another Establishment Clause case brought by people whose religion was directly condemned by their government."). Petitioners suggest that (a) in cases of government speech that is rationally related to our Nation's long history and tradition of recognizing and accommodating religion, such as those involving the display of religious symbols during national holidays,[6]

---

[6] *See Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.").

Ten Commandments displays,[7] the use of a cross in a war memorial,[8] legislative prayer,[9] or the use of words such as "under God" in the pledge of allegiance or "In God We Trust" in our national motto,[10] the Court should adopt a rational basis standard of review; and (b) in cases that do not meet this threshold requirement, such as those involving government speech that expresses hostility toward religion as illustrated by the anti-Catholic resolution at issue here, a strict scrutiny standard should apply. *See* sec. I. B., *infra*. Such an approach is consistent with our history and traditions and the construct of the First Amendment. *See, e.g., Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of

---

[7] *Van Orden v. Perry*, 545 U.S. 677, 688 (2005) (upholding the display of a Ten Commandments monument on the grounds of the Texas State Capital and acknowledging the history of such displays).

[8] *See, e.g., Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) ("It is reasonable to interpret the congressional designation [of the cross as a national war memorial] as giving recognition to the historical meaning that the cross had attained.").

[9] *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding the constitutionality of legislative prayer and stating, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country").

[10] *See generally Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26, 35-36 (2004) (Rehnquist, C.J., concurring) (O'Connor, J., concurring) (acknowledging patriotic invocations of God and official acknowledgment of religion's role in our Nation's history).

religion in general."); *McCreary Cnty.*, 545 U.S. at 887 (Scalia, J., dissenting) ("Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); *Marsh*, 463 U.S. at 790 ("[H]istorical evidence sheds light . . . on what the draftsmen intended the Establishment Clause to mean."); *see also Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing *en banc*) ("The court's decision in this case perpetuates a regrettable misapprehension of the Establishment Clause: that recognition of the role of religion in this country's founding, history, traditions, and laws is to be strictly excluded from the civic sphere."). And it offers a well-established analytical framework within which to evaluate Establishment Clause claims. This framework would provide needed guidance for the lower courts and would stem the tide of "silly" cases and opinions.

A. THE COURT SHOULD ADOPT A RATIONAL BASIS STANDARD OF REVIEW FOR GOVERNMENT "RELIGIOUS" SPEECH THAT IS REASONABLY RELATED TO OUR NATION'S HISTORY AND TRADITIONS.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343

U.S. 306, 313 (1952). "From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life." *Van Orden*, 545 U.S. at 678 (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto, "In God We Trust," the display of the crèche during Christmas, *see Lynch*, 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property, *Van Orden*, 545 U.S. at 677, among others, *see also Marsh*, 463 U.S. 783 (upholding legislative prayer); *see also McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, the Court concluded its recitation of examples of government recognition of religion by stating,

> One cannot look at even this brief resume [of historical examples] without finding that *our history is pervaded by expressions of religious beliefs*. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and *hostility toward none*. Through this accommodation, as Justice Douglas observed, governmental action has "[followed] the best of our traditions" and "[respected] the religious nature of our people." [*Zorach*, 343 U.S. at 314].

465 U.S. at 677-78 (emphasis added).

As this Court observed: "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion." *Van Orden*, 545 U.S. at 687 (internal quotations, brackets, and citations omitted); *see also Elk Grove Unified Sch. Dist.*, 542 U.S. at 26 (Rehnquist, C.J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."); *id.* at 35-36 (O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance."); *Van Orden*, 545 U.S. at 688 ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America."). Governmental suppression of this tradition is the antithesis of the value of religious tolerance that underlies the Establishment Clause. *See, e.g., Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment).

Thus, while it cannot honestly be denied that we are a religious people with a long and rich religious heritage, policy decisions that disfavor religion, such as the resolution at issue here, do not enjoy such a favorable history and should, therefore, be treated differently under the law. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "*forbids* hostility toward any" religion) (internal punctuation, quotations, and citations omitted) (emphasis added); *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (stating that the Constitution "*forbids* an official purpose to disapprove of a particular religion or of religion in general") (emphasis added).

Therefore, this Court should adopt the deferential rational basis standard of review for government "religious" speech that is reasonably or rationally related to our Nation's history and traditions. This standard would respect our Nation's history, it would be consistent with the framework of the First Amendment, and it would provide a well-established test for the lower courts to apply. Moreover, it would remove from the calculus the "complying with the Establishment Clause" claim so often invoked as justification for the government's hostility toward religion. *See Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 174 (3d Cir. 2008) ("The Supreme Court has stated that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.") (internal quotations and citation omitted); *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 604-06 (3d Cir. 2009) (upholding a ban on the performance of traditional Christmas music in public schools and finding that the ban had a legitimate secular purpose of avoiding "a potential Establishment Clause violation"); *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990) (holding that a school district's order directing a teacher not to leave his Bible in sight or to read silently from it during classroom hours had a secular purpose in that it was intended "to assure that none of [the teacher's] classroom materials or conduct violated the Establishment Clause"); *see also Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246 (9th Cir. 2007) (holding that the removal of a small, historic cross from the

county seal had a valid secular purpose of avoiding a potential Establishment Clause violation); *but see Widmar v. Vincent*, 454 U.S. 263, 270-71 (1981) (holding that the state's interest in complying with the Establishment Clause did not justify discrimination against a religious group).

On the other hand, government "religious" speech that does not share the same history and tradition, such as the anti-Catholic resolution presently before this Court, should be treated under a higher standard of review.

B. THE COURT SHOULD ADOPT A STRICT SCRUTINY STANDARD OF REVIEW FOR GOVERNMENT "RELIGIOUS" SPEECH THAT IS NOT REASONABLY RELATED TO OUR NATION'S HISTORY AND TRADITIONS.

Government "religious" speech that is not reasonably or rationally related to our Nation's history and tradition of recognizing and accommodating religion should be subject to a heightened level of scrutiny.

For example, because the Constitution *forbids* hostility toward a particular religion or of religion in general—hostility that has no place in our Nation's history and traditions—such practices should be judged under the Establishment Clause by applying a strict scrutiny standard of review. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *see also id.* (observing that "such hostility would bring us into

war with our national traditions embodied in the First Amendment[]"); *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring) (noting that "hostility toward religion . . . has no place in our Establishment Clause traditions"); *cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (applying strict scrutiny to strike down a law under the Free Exercise Clause that targeted a particular religion). Thus, government speech that explicitly disfavors religion, such as the resolution at issue here, should be held "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533. Here, there is no compelling interest—or indeed even a rational basis—to justify the "insolent, stupid, or worse," *see* App. 37a, resolution expressly condemning Petitioners' religion.

Similarly, strict scrutiny should apply to government "religious" speech that favors religion in a way that is inconsistent with our Nation's history and traditions. For example, a heightened level of scrutiny should apply to a government resolution that officially affirmed the Catholic doctrine of transubstantiation, *see, e.g., Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."), or established the official definition of "kosher" for the Jewish faith, *see, e.g., Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) (holding that the government violated the Establishment Clause because it suggested a "preference for the views of one branch of Judaism"). Taking an official position on a specific theological proposition is qualitatively different from government speech that is reasonably or rationally related to our Nation's history and tradition

of recognizing and accommodating society's belief in God.

II. THE *EN BANC* DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER CIRCUIT COURTS, AND IT PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

Should the Court decide not to substantially revise its unworkable Establishment Clause jurisprudence, Petitioners contend that the Court should summarily reverse the *en banc* decision because it conflicts with the controlling principles of law set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *Edwards v. Aguillard*, 482 U.S. 578 (1987), and *Epperson v. Arkansas*, 393 U.S. 97 (1968), among others, and it presents an issue of considerable national importance.

A. THE ESTABLISHMENT CLAUSE SHOULD NOT TOLERATE GOVERNMENT SPEECH THAT EXPRESSLY DISFAVORS RELIGION.

This Court has previously stated that when evaluating claims under the Establishment Clause "the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and that we guard against other different, yet equally important, constitutional injuries." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (internal quotations and citation omitted). One such way in which these "values" are eroded is by the passage of a government resolution that singles out a

specific religion for disfavored treatment. An evenhanded application of prior precedent should compel a reversal in this case. Unfortunately, with little exception, the application of this Court's modern Establishment Clause jurisprudence has led the law to disfavor religion, thereby encouraging callous acts of religious discrimination such as the challenged resolution at issue here. Indeed, the *en banc* decision, if left unchecked, will further embolden those government officials who are anti-religious (or, worse, anti-Catholic). And it will add further confusion to the Court's already confused Establishment Clause jurisprudence.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, *such hostility would bring us into war with our national tradition* as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), the Court

acknowledged the following: "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or *of religion in general*." (emphasis added).

Despite an occasional appearance of neutrality and suggestion that the Constitution is *not* hostile toward religion, the reality is that this Court's Establishment Clause jurisprudence is frequently used as a blunt instrument against all thing religious in public life.

While some on this Court still believe that our Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any," *Lynch*, 465 U.S. at 673, this case will afford the Court the opportunity to breathe new and lasting life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts. As this case shows, the Court's prophetic observation in *Lynch* that "[a]nything less would require the callous indifference [that] was never intended by the Establishment Clause," thereby bringing "us into war with our national tradition" has come to fruition. It is time to reverse this harmful and divisive trend.

B. THE *EN BANC* DECISION DIRECTLY AND SHARPLY CONFLICTS WITH ESTABLISHED PRECEDENT AND PROMOTES A PERCEPTION THAT THE LAW IS HOSTILE TOWARD RELIGION.

Throughout its decisions, this Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire

to promote or "advance" religion, *see, e.g., Cnty. of Allegheny,* 492 U.S. at 592, but also actions that tend to "disapprove of," "inhibit," or evince "hostility" toward religion, *see Edwards*, 482 U.S. at 585 ("disapprove"); *Lynch,* 465 U.S. at 673 ("hostility"); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). The Court has also noted that our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995); *see Lynch*, 465 U.S. at 668, 673 (stating that the Constitution "forbids hostility toward any" religion); *see also Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 532 (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general").

A state-sponsored message of disapproval of religion, as evidenced by Respondents' anti-Catholic resolution, sends a message to Petitioners and other Catholics that their religion is disfavored in the community. *See Cnty. of Allegheny,* 492 U.S. at 597. The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (striking down a law that targeted a particular religious practice).

More recently, in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> [The removal of the religious symbol], based primarily upon the religious nature of the tablets' text would, I fear, *lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.* Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. *And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.*

Id. at 704 (emphasis added).

While the language from these cases appears to support a "disapproval of religion" claim, the practical reality is that such claims are given little traction by the lower courts, as this and other cases demonstrate. *See Stratechuk v. Bd. of Educ.*, 587 F.3d 597 (3d Cir. 2009) (upholding against an Establishment Clause challenge a school district's ban on the performance of traditional Christmas music in its public schools because the music is associated with a religious holiday); *Am. Family Ass'n v. City & Cnty. of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that San Francisco's resolution condemning a religious organization's advertisement opposing homosexuality did not violate the Establishment Clause); *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246 (9th Cir. 2007) (upholding against an Establishment Clause challenge the government's removal of a small, historic cross from the county seal because the cross was a religious symbol); *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is

. . . violated as much by government disapproval of religion as it is by government approval of religion," but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (upholding a government display of an anti-Catholic statue against an Establishment Clause challenge); *cf. Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (upholding the ban of a student performance of "Ave Maria" at a public school graduation). *Compare Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (acknowledging that removing Christian symbols, such as a cross, from all public displays "evinces not neutrality, but instead hostility, to religion" and holding that the inclusion of a Christian cross in the city insignia did not violate the Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) ("Limiting the number of times a religious piece of music can be sung is tantamount to censorship and *does not send students a message of neutrality*. . . . Such animosity towards religion is *not required or condoned by the Constitution*.") (emphasis added); *see also ACLU v. Mercer Cnty.*, 432 F.3d 624, 638-39 (6th Cir. 2005) (upholding the public display of the Ten Commandments and observing that the "repeated reference to 'the separation of church and state'" is an "extra-constitutional construct [that] has grown tiresome"). At a minimum, there is much confusion in the lower federal courts that only this Court can clarify. *Green*, 574 F.3d at 1245 (Gorsuch, J., dissenting from denial of rehearing *en banc*) ("[U]ntil our superiors speak, we leave the state of the law in Establishment Clause purgatory.") (internal quotations and citation omitted).

In the Ninth Circuit, and elsewhere, even the most subtle and inconsequential act *favorable* to religion is

quickly held impermissible, *see, e.g.*, *Trunk*, 2011 U.S. App. LEXIS 53 (declaring the use of a cross in a longstanding war memorial unconstitutional); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008) (prohibiting a football coach's participation in *student-led* prayer by silently bowing his head during grace and taking a knee during locker room prayer); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009) (refusing to allow a parent to read Bible verses to her son's kindergarten class during the student's "All About Me" week); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (allowing an option for student-initiated and student-led prayer at high school football games violated the Establishment Clause), making hostility to religion the standard to comport with the Establishment Clause. This view of the Court's jurisprudence inevitably leads to a view of the law that is disapproving of religion.

Indeed, an official resolution that explicitly condemns Catholics and their religion is not *neutral* toward religion, but rather hostile to it. And even *subtle departures from neutrality* are allegedly prohibited by the Establishment Clause. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534; *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (admonishing the courts to "keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded" and to "guard against other different, yet equally important, constitutional injuries"); *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "hostility to the religious"). But these principles are often cast aside in favor of an approach that employs curettage and disinfectant for all that partakes of the

religious in public life—an approach wrought by this Court's muddled jurisprudence.

In the present case, the resolution violates the Establishment Clause *on its face* because it *expressly* and in *explicit terms* condemns Catholics and their religion. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (holding that "the *mere passage* by the District of a policy" that has the "purpose and perception" of favoring religion violates the Constitution) (emphasis added). An examination of the resolution demonstrates that the City's departure from neutrality was anything but "subtle"; it created the very kind of political divisiveness along religious lines that the Establishment Clause was apparently designed to avoid.

Unfortunately, the Ninth Circuit's *en banc* decision represents an entrenched and improper double standard for Establishment Clause cases that requires only a minimal standard of proof for finding a constitutional violation in "approval" cases and a very high standard of proof for finding a constitutional violation in "disapproval" cases. This case presents a perfect opportunity to eliminate this double standard in the lower federal courts by applying the Establishment Clause in an evenhanded manner, as required by this Court's precedent.

In the final analysis, the *en banc* court's decision contravenes this Court's case law prohibiting government disapproval of religion and should be summarily reversed. However, the lack of clarity from this Court, particularly with regard to "disapproval" claims, is undoubtedly a major contributing factor for the fractured opinion below. Therefore, the Court

should grant review of this case to clarify its jurisprudence.

CONCLUSION

While it is evident that the *en banc* decision conflicts with several decisions from this Court and other circuit courts so that consideration is necessary to secure and maintain uniformity of decisions on an important issue of federal law, the crux of the problem is that this Court's Establishment Clause jurisprudence is in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the present Establishment Clause framework, which tends to be hostile toward religion, in favor of a workable standard that is not only capable of consistent application, but that is consistent with our Nation's religious history and traditions.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001
rmuise@thomasmore.org

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion, United States Court of Appeals for the Ninth Circuit, (October 22, 2010) 1a

Appendix B: Order, United States Court of Appeals for the Ninth Circuit, (November 5, 2009) 84a

Appendix C: Opinion, United States Court of Appeals for the Ninth Circuit, (June 3, 2008) 86a

Appendix D: Memorandum and Order/ Judgment, United States District Court, Northern District of California, (November 30, 2006) 115a

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-17328

D.C. No. CV-06-02351-MHP

[Filed October 22, 2010]

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS; RICHARD SONNENSHEIN; VALERIE MEEHAN, *Plaintiffs-Appellants,*	)
v.	)
CITY AND COUNTY OF SAN FRANCISCO; AARON PESKIN; TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors, City and County of San Francisco, *Defendants-Appellees.*	)

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, Senior District Judge, Presiding

Argued and Submitted
December 16, 2009—San Francisco, California

Filed October 22, 2010

Before: Alex Kozinski, Chief Judge,
Pamela Ann Rymer, Andrew J. Kleinfeld,
Michael Daly Hawkins, Sidney R. Thomas,
Barry G. Silverman, Susan P. Graber,
M. Margaret McKeown, Richard R. Clifton,
Jay S. Bybee and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Kleinfeld;
Concurrence by Judge Silverman;
Partial Concurrence and Partial Dissent
by Judge Graber

COUNSEL

Robert Joseph Muise, Thomas More Law Center, Ann Arbor, Michigan, for the appellants.

Vince Chhabria, Deputy City Attorney, San Francisco, California, for the appellees.

Michael Newdow, Sacramento, California, for amicus curiae Michael Newdow.

Bridget Jeanne Wilson, Rosenstein, Wilson & Dean, P.L.C., San Diego, California, for amicus curiae DignityUSA.

Erwin Chemerinsky, University of California, Irvine, California, for amicus curiae Law Professors Alan Brownstein, Jordan Budd, and Erwin Chemerinsky.

David Blair-Loy, ACLU Foundation of San Diego & Imperial Counties, San Diego, California, for amicus curiae ACLU of San Diego & Imperial Counties.

OPINION

KLEINFELD, Circuit Judge:

A majority of the court has concluded that the plaintiffs have standing. A separate majority, for differing reasons, affirm the district court's dismissal of the plaintiffs' claim.

Parts I and II of this opinion are joined by Judges THOMAS, SILVERMAN, CLIFTON, BYBEE, and IKUTA. Part III of this opinion, addressing the merits of the plaintiffs' claim, is a dissent, joined by Judges BYBEE and IKUTA. Five of us, including Chief Judge KOZINSKI and Judges RYMER, HAWKINS, and McKEOWN, conclude that the plaintiffs have no standing, as set forth in Judge GRABER's opinion. Three of us, including Judges THOMAS and CLIFTON, concur in the judgment, concluding that although the plaintiffs do have standing, their claim fails on the merits, as set forth in Judge SILVERMAN's opinion.

I. Facts[1]

We address whether Catholics and a Catholic advocacy group in San Francisco may sue the City on account of an official resolution denouncing their church and doctrines of their religion. They may.

Pope Paul III established the Congregation for the Doctrine of the Faith a half millennium ago.[2] It safeguards and promotes Catholic doctrine on faith and morals. In 2003, the Congregation addressed homosexual marriage and adoption, concluding that both were immoral, and that it was the moral duty of Catholics to oppose both. To carry out this doctrinal decision, Cardinal William Joseph Levada directed the Archdiocese of San Francisco that Catholic agencies should not place children for adoption in homosexual households.

San Francisco immediately responded with official hostility. The San Francisco Board of Supervisors adopted the resolution giving rise to this lawsuit. The resolution urges the Cardinal to withdraw his instructions; denounces the Cardinal's directive as "meddl[ing]" by a "foreign country"; calls it "hateful," "insulting," and "callous"; and urges the local archbishop and Catholic Charities to "defy" the

---

[1] Because the complaint was dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief could be granted, we take the factual allegations from the complaint to determine whether, if proved, they would establish a claim. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006). We therefore state the facts as pleaded.

[2] 1542, 468 years ago.

Cardinal's instructions. Here is Resolution 168-06 in full:

> **Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.**
>
> WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and
>
> WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and
>
> WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has

seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.[3]

---

[3] S.F. Res. No. 168-06 (Mar. 21, 2006), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions06/r0168-06.pdf.

Plaintiffs sued the City, claiming that this official government resolution violates the Establishment Clause. The district court dismissed their lawsuit for failure to state a claim upon which relief could be granted, and we initially affirmed.[4] We then voted to rehear the case en banc, and now affirm the district court's dismissal on differing grounds.

II. Standing

The complaint alleges that plaintiffs are a Catholic civil rights organization and two devout Catholics who live in San Francisco. They aver that the resolution conveys a government message of disapproval and hostility toward their religious beliefs. It "sends a clear message," they plead, "that they are outsiders, not full members of the political community." They allege that they have been injured by "misuse of the instruments of government to criticize, demean and attack their religion and religious beliefs, thereby chilling their access to the government." The individual plaintiffs aver that they "will curtail their activities to lessen their contact" with the city and county government, and the two members of the Board of Supervisors sued because of the resolution.

After raising the question of standing sua sponte, we asked the parties for letter briefs addressing it. The City and County conceded standing, arguing that "the individual plaintiffs have successfully pleaded standing, having alleged that they are members of the

---

[4] *Catholic League for Religious and Civil Rights v. San Francisco*, 567 F.3d 595 (9th Cir. 2009), *reh'g en banc granted* 586 F.3d 1166 (9th Cir. 2009).

community who have had contact with the resolution and have suffered spiritual harm as a result." Were the result otherwise, the municipality concedes, a resolution declaring Catholicism to be the official religion of the municipality would be effectively unchallengeable. The municipality also concedes that the Catholic League has "associational standing."

"At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.' "[5] Had a Protestant in Pasadena brought this suit, he would not have had standing. Catholics in San Francisco, on the other hand, have sufficient interest, so that well-established standing doctrine entitles them to litigate whether an anti-Catholic resolution violates the Establishment Clause. Standing, or the lack of it, may be intertwined with whether the complaint states a claim upon which relief can be granted, but it is not the same thing.[6] Standing is not about who wins the lawsuit; it is about who is allowed to have their case heard in court. It would be outrageous if the government of San Francisco could condemn the religion of its Catholic citizens, yet those citizens could not defend themselves in court against their government's preferment of other religious views.

---

[5] *See Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

[6] *Cf. Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511-12 (2006).

Nevertheless, some of us have dissented on standing, so we address the issue. The standing question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views, and official urging by their government that their local religious representative defy their church. Their "personal stake" assures the "concrete adverseness" required. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[7] Plaintiffs aver that not only does the resolution make them feel like second-class citizens, but that their participation in the political community will be chilled by the City's hostility to their church and their religion.

[1] The constitutional requirement of standing has three elements: (1) the plaintiff must have suffered an injury-in-fact — that is, a concrete and particularized invasion of a legally protected interest that is actual or imminent, not conjectural or hypothetical; (2) the injury must be causally connected — that is, fairly traceable — to the challenged action of the defendant and not the result of the independent action of a third party not before the court; and (3) it must be likely and not merely speculative that the injury will be

---

[7] *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (adopting Justice O'Connor's rationale in *Lynch*).

redressed by a favorable decision by the court.[8] "The concept of a 'concrete' injury is particularly elusive in the Establishment Clause context . . . because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature."[9]

It is, of course, incumbent upon the courts to apply standing doctrine neutrally, so that it does not become a vehicle for allowing claims by favored litigants and disallowing disfavored claimants from even getting their claims considered. Without neutrality, the courts themselves can become accessories to unconstitutional endorsement or disparagement. Standing is emphatically not a doctrine for shutting the courthouse door to those whose causes we do not like. Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true.

[2] Standing was adequate for jurisdiction in Establishment Clause cases in the Supreme Court in the following contexts: prayer at a football game,[10] a

---

[8] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982).

[9] *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007).

[10] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313-14 (2000).

crèche in a county courthouse[11] or public park,[12] the Ten Commandments displayed on the grounds of a state capitol[13] or at a courthouse,[14] a cross display at a national park,[15] school prayer,[16] a moment of silence at school,[17] Bible reading at public school,[18] and a religious invocation at a graduation.[19] No one was made to pray, or to pray in someone else's church, or to support someone else's church, or limited in how they prayed on their own, or made to worship, or prohibited from worshiping, in any of these cases. The Court treated standing (and therefore the concreteness element of standing) as sufficient in all of these cases, even though nothing was affected but the religious or irreligious sentiments of the plaintiffs.[20]

---

[11] *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

[12] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[13] *Van Orden v. Perry*, 545 U.S. 677 (2005).

[14] *McCreary Cnty. v. ACLU of Ky.*, 515 U.S. 844 (2005).

[15] *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

[16] *Engel v. Vitale*, 370 U.S. 421 (1962).

[17] *Wallace v. Jaffree*, 472 U.S. 38 (1985).

[18] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

[19] *Lee v. Weisman*, 505 U.S. 577 (1992).

[20] Judge Graber's argument appears to be that since this case does not involve a challenge to a religious display on government property, a religious exercise at a public ceremony, or a "specific governmental policy or statutory provision," there is no standing. There is not a single standing case that limits Establishment

[3] We have concluded that standing was established in cases involving displaying crosses on

---

Clause standing to these three categories. Most of the cases fall into them because American governments have typically been sympathetic to religion rather than hostile to it. Establishment Clause challenges, because of this typical governmental sympathy for religion, tend to challenge governmental endorsement. The Supreme Court, though, has carefully linked rejection of endorsements to rejection of condemnations in virtually every discussion of the subject. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1992) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion . . . ."). Moreover, an official resolution of the City of San Francisco is indeed a "case[ ] involving a specific governmental policy," condemning, in this case, the Catholic Church. The distinction Judge Graber draws between a governmental display and a government's official resolution cuts against her view. A symbol such as a crèche on the city hall lawn is ambiguous. It may mean that the government endorses Christianity, or it may mean that the government merely wishes to show respect and friendship for Christianity. The resolution at issue, like a symbol, conveys a message, but unlike a symbol, the message is unambiguous. Judge Graber's opinion would ignore San Francisco's plain denunciation of the Catholic Church because it is unaccompanied by symbolic public art. The opinion also ignores binding Supreme Court precedent on government speech: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. . . . This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131-32 (2009).

government land,[21] removing a cross from a city seal,[22] disciplining physicians who performed surgery without blood transfusions in a lawsuit by Jehovah's Witnesses,[23] including the words "under God" in the Pledge of Allegiance,[24] and contracting with the Boy Scouts to administer a city recreational facility.[25] The harm to the plaintiffs in those cases was spiritual or psychological harm.[26] That is the harm plaintiffs claim

---

[21] *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (per curiam).

[22] *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007).

[23] *Graham v. Deukmejian*, 713 F.2d 518, 519 (9th Cir. 1983).

[24] *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010).

[25] *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008).

[26] Judge Graber cites many, many standing cases and faults us for not discussing all of them to the same extent. The reason why all need not be patiently explicated is that not a single one of Judge Graber's cited cases involves a government condemnation of a particular church or religion. The attempt to tease out of the rhetoric explaining the holdings in other, quite different, factual circumstances fails because the language in every case explained a different result. True, there are so many Establishment Clause standing cases that the language (as opposed to the holdings) in some furnishes ammunition for Judge Graber's view. *Newdow v. LeFevre* upholds standing to challenge federal statutes requiring "In God We Trust" on currency, but not the federal statute making "In God We Trust" the national motto. 598 F.3d 638, 642 (9th Cir. 2010). *Newdow v. Rio Linda Union School District* has dicta that a parent and child lacked standing to challenge the federal statute

here. If we conclude that plaintiffs in the case before us have standing, we need not decide whether those cases retain their vitality or are overruled, because our conclusion would be consistent with them. But if we reject standing for plaintiffs in this case, then those cases must somehow be distinguished convincingly (a difficult task), or overruled.

The leading Supreme Court Establishment Clause case for the absence of Establishment Clause standing is *Valley Forge Christian College v. Americans United for Separation of Church and State*.[27] The government had conveyed surplus property to a religious college,

---

adding "under God" to the pledge of allegiance, but holds that they had standing to challenge the California law requiring the pledge's recitation in the schools even though no child was required to recite it. 597 F.3d 1007, 1016 (9th Cir. 2010). Judge Graber's stretch from federal statutes regarding traditional patriotic formulas that include vague and general religiosity, to a local ordinance condemning the church and religious views of some of the municipality's residents, takes the explanatory language of these cases too far. Additionally, Judge Graber argues that a one-page Eighth Circuit per curiam opinion, *Flora v. White*, is "indistinguishable" from this case. 692 F.2d 53 (8th Cir. 1982) (per curiam). Hardly. The Eighth Circuit held that the plaintiffs lacked standing to challenge a provision in the Arkansas Constitution making atheists incapable of holding public office or to testify as a witness, where the plaintiffs had no plans to do either. *Id.* at 54. Their being offended because they were atheists was analogized to the plaintiffs offended but not affected in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). *See Flora*, 692 F.2d at 54. Unlike either of these cases, the plaintiffs here are not suing on the mere principle of disagreeing with San Francisco, but because of that city's direct attack and disparagement of their religion.

[27] 454 U.S. 464 (1982).

for free, subject to a condition subsequent requiring use for thirty years solely as an educational institution.[28] The plaintiffs sued because the college was avowedly and plainly a sectarian Christian institution that would operate for sectarian Christian purposes. The Court held that Americans United lacked standing, not only for a taxpayers suit under *Flast v. Cohen*,[29] but also as individuals and a group affected by government action respecting an establishment of religion.[30] The reason they lacked the concrete injury necessary for standing was that, regardless of whether the government action violated the Establishment Clause, they had no concrete injury beyond the offense to their desire to have the government conform to the Constitution.[31] "They fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[32] These plaintiffs were like the Protestants in Pasadena suing San Francisco over its anti-Catholic resolution.

[4] One has to read the whole *Valley Forge* sentence quoted, and not stop at "psychological consequence," to understand it. A "psychological

---

[28] *Id.* at 468.

[29] 392 U.S. 83 (1968).

[30] *Valley Forge*, 454 U.S. at 479-80, 485-86.

[31] *Id.* at 485-86.

[32] *Id.* at 485.

consequence" does not suffice as concrete harm where it is produced merely by "observation of conduct with which one disagrees." But it does constitute concrete harm where the "psychological consequence" is produced by government condemnation of one's own religion or endorsement of another's in one's own community. For example, in the school prayer and football game cases, nothing bad happened to the students except a psychological feeling of being excluded. Likewise in the crèche and Ten Commandments cases, nothing happened to the non-Christians, or to people who disagreed with the Ten Commandments or their religious basis, except psychological consequences. What distinguishes the cases is that in *Valley Forge*, the psychological consequence was merely disagreement with the government, but in the others, for which the Court identified a sufficiently concrete injury, the psychological consequence was exclusion or denigration on a religious basis within the political community.[33]

---

[33] Judge Graber argues that standing is appropriate in the religious display cases, but not this case of condemnation of a religion, because those who challenge a religious display have frequent or regular contact with it and are harmed because they cannot freely use public areas. This distinction cuts the other way, however, as explained above. Living in a city that condemns one's religion is a daily experience of contact with a government that officially condemns one's religion. A plaintiff's having visual contact with a cross is immaterial, and would not raise a question if it were merely in a painting in the city art museum, because a reasonable person would not infer a government's position on a religion from the painting. The "contact" that matters is in the mind — acquisition of the knowledge that the government endorses (or condemns) a religion. An official government condemnation of a religion unambiguously and inescapably

[5] Plaintiffs allege that they are directly stigmatized by San Francisco's actions. They allege that the stigmatizing resolution leaves them feeling like second-class citizens of the San Francisco political community, and expresses to the citizenry of San Francisco that they are. The cause of the plaintiffs' injury here is not speculative: it is the resolution itself. Plaintiffs allege that their "Sacred Scripture" "presents homosexual acts as acts of grave depravity," and that "Catholic tradition has always declared that homosexual acts are intrinsically disordered." Plaintiffs believe as part of their religion that "Catholics have an obligation to state clearly the

---

conveys knowledge of that condemnation. Judge Graber's notion that the public display cases involve restriction on movement relies on a false factual proposition. In none of the religious display cases is there any law prohibiting free use of public areas by those who are not adherents to the religion. The nonadherents simply feel uncomfortable in the presence of a display endorsing someone else's religion. There is no principled basis for assiduously addressing that discomfort, yet treating as trivial the discomfort of those whose religion is condemned by their government. The plaintiffs are as affected by what the San Francisco government has done — condemning their religion — as an atheist would be if the San Francisco government erected a giant cross on top of its biggest hill, on which he happened to live and which he would be walking past on the way to work. The government cannot constitutionally endorse a religion by erecting the cross; nor, analogously, can it condemn religion by erecting a gigantic sign on city hall of a cross with a line through it: a "no Christianity" sign with the design of a "no smoking" sign. The Board's resolution accomplishes the same thing as the aforementioned sign, but even more plainly and unambiguously. Symbols endorsed or adopted by a government are often ambiguous, but the words in this resolution are not. Consequently, this is an easier and more direct case for standing than any of the religious-symbolism cases cited by Judge Graber.

immoral nature of homosexual unions so as to safeguard public morality, and above all, to avoid exposing young people to erroneous ideas about sexuality and marriage. Clear and emphatic opposition to homosexual unions is a duty of all Catholics." San Francisco directly disparages these religious beliefs through its resolution by calling them "hateful and discriminatory," "insulting and callous," and "insensitiv[e] and ignoran[t]."

[6] The concreteness of injury is sufficiently pleaded here because plaintiffs aver that: (1) they live in San Francisco; (2) they are Catholics; (3) they have come in contact with the resolution; (4) the resolution conveys a government message of disapproval and hostility toward their religious beliefs; that (5) "sends a clear message" "that they are outsiders, not full members of the political community"; (6) "thereby chilling their access to the government"; and (7) forcing them to curtail their political activities to lessen their contact with defendants.

[7] Standing also requires redressability, that is, that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[34] Plaintiffs seek a declaratory judgment that the resolution is unconstitutional, and nominal damages for the violation of their rights. By declaring the resolution unconstitutional, the official act of the government becomes null and void.[35] Even more

---

[34] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted).

[35] *See, e.g., Powell v. McCormack*, 395 U.S. 486, 506 (1969) (" 'Especially is it competent and proper for this court to consider

important, a declaratory judgment would communicate to the people of the plaintiffs' community that their government is constitutionally prohibited from condemning the plaintiffs' religion, and that any such condemnation is itself to be condemned. This would reaffirm the fundamental principle that

> [t]he basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.
>
> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, *and that it work deterrence of no religious belief*.[36]

---

whether its (the legislature's) proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.' " (quoting "language which time has not dimmed" from *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880))).

[36] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (emphasis added), *quoted with approval in Larson v. Valente*, 456 U.S. 228, 246 (1982).

III. Merits

I dissent with regard to the merits of the Board's resolution.

"The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[37] Government runs afoul of the Establishment Clause through "endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[38] Plaintiffs complain here of just such governmental disparagement of their religion.

We have not found another Establishment Clause case brought by people whose religion was directly condemned by their government. Though there have been lapses, as with Mormons and Jehovah's Witnesses, tradition even more than law has generally restrained our national, state, and local governments from expressing condemnation or disrespect for anyone's religion. George Washington set the tone for our governmental relationship to religion even before the First Amendment was ratified, in his 1790

---

[37] *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *see also Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (adopting Justice O'Connor's rationale in *Lynch*).

[38] *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

expression of goodwill to the Hebrew Congregation in Newport, Rhode Island:

> All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.[39]

The only recent Court decision on government hostility to a particular religion that we have found is the free exercise decision of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, where the Court notes that its Establishment Clause cases "have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."[40] That case, along with many other opinions of the Court, stands for the principle that government has no legitimate role under the Establishment Clause in judging the religious beliefs

---

[39] *Critical Documents of Jewish History* 3 (Ronald H. Isaacs & Kerry M. Olitzky eds. 1995).

[40] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1992) (citing six cases).

of the people — either by praise or denunciation.[41] This principle requires that we nullify San Francisco's governmental condemnation of Catholic doctrine.

Though much criticized,[42] *Lemon v. Kurtzman*[43] remains controlling on Establishment Clause violations, subject to subsequent emendations as the

---

[41] *See, e.g.*, *Lynch*, 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.*" (emphasis added)).

[42] *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (warning that "the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (lamenting that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ." And detailing how "[o]ver the years . . . no fewer than five of the [then] sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so"); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, concurring in part) (expressing his view "that the endorsement test is flawed in its fundamentals and unworkable in practice"); *Comm. for Pub. Ed. v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J. dissenting) (explaining that the Court should abandon "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*")

[43] 403 U.S. 602 (1971).

"endorsement" and "neutrality" principles have developed.[44] Under *Lemon*, government action must have a secular purpose, "its principal or primary effect must be one that neither advances nor inhibits religion," and it "must not foster excessive entanglement with religion."[45]

The municipality argues that its purpose was not to condemn Catholicism, but rather to foster equal treatment of people who are gay and lesbian. That is indeed a legitimate purpose, but we would not have this case before us if that were all that the resolution said. The San Francisco government would face no colorable Establishment Clause challenge had they limited their resolution to its fourth "whereas," that "[s]ame sex couples are just as qualified to be parents as heterosexual couples." San Francisco is entitled to take that position and express it even though Catholics may disagree as a matter of religious faith. But the title paragraph, the other five "whereas" clauses, and the "resolved" language are all about the Catholic Church, not same-sex couples.

The municipality argues that any reasonable recipient of its message would also be familiar with its forty-one other resolutions condemning discrimination against homosexuals and anti-homosexual speech in

---

[44] *See Lamb's Chapel*, 508 U.S. at 395 n.7 (stating, in response to Justice Scalia's assertion that *Lemon* was a "ghoul in a late-night horror movie," that "there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled").

[45] *Lemon*, 403 U.S. at 612-13.

Russia,[46] Germany,[47] Florida,[48] Alabama,[49] by a senator from another state,[50] by various celebrities,[51] and by a football team.[52] The municipality claims that these show that its concern is homosexuals, not Catholicism, and that any inference of anti-Catholicism is decisively rebutted because anyone would know that the councilman who introduced the resolution is Catholic. The argument seems bizarre. Why would anyone know the personal religious faith of each city councilman? Or be familiar with all the resolutions of their municipal government, not just the one attacking their church? And why should the underlying secular motive

---

[46] S.F. Res. No. 364-06 (June 13, 2006), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions06/r0364-06.pdf.

[47] S.F. Res. No. 220-00 (Mar. 13, 2000), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions00/r0220-00.pdf.

[48] S.F. Res. No. 73-05 (Jan. 25, 2005), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions05/r0073-05.pdf.

[49] S.F. Res. No. 234-99; *see Am. Family Ass'n v. City & Cnty. of San Francisco*, 277 F.3d 1114, 1119 (9th Cir. 2002).

[50] S.F. Res. No. 308-03 (May 6, 2003), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions03/r0308-03.pdf.

[51] *See, e.g.*, S.F. Res. No. 199-00 (Mar. 6, 2000), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions00/r0199-00.pdf.

[52] S.F. Res. No. 454-05 (June 14, 2005), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions05/r0454-05.pdf.

inferable from other government actions cure an expressed anti-Catholic purpose in the action challenged? Regardless of what the underlying motivation may be for the various individuals on the city council, a court must, in deciding whether a government action violates the Establishment Clause, read the words of the government enactment.[53] If the zoning board prohibited all synagogues and mosques from operating within the city limits, the action would not be saved even by a legislative history that persuasively demonstrated a secular motive of avoiding strife between Jews and Muslims. "[O]fficial objective emerges from readily discoverable fact,

---

[53] Judge Silverman suggests that the resolution should be read in the context of San Francisco's history of promoting gay rights and supporting the rights of same-sex couples. A strong city policy of favoring gay rights, though, does not justify official attacks on religion. The San Francisco government used the group version of an ad hominem argument. Instead of a resolution simply favoring same-sex adoption and criticizing the arguments against it, the resolution attacked the religion of those against it. A secular motive for smearing anti-Catholic graffiti on a cathedral would not erase the anti-Catholic message conveyed. The Board of Supervisors went out of its way to characterize Catholicism as coming from a "foreign country[:] the Vatican," its teachings as "hateful," and implicitly compared modern-day Catholic officials to the Inquisition. These are traditional anti-Catholic tropes employed for centuries by anti-Catholic bigots. *See, e.g.*, Thomas E. Watson, *Rome's Law, Or Our's — Which?*, The Jeffersonian, Sept. 7, 1916, at 4 (using the same rhetorical device as the Board of Supervisors, Tom Watson, the Populist supporter of the Ku Klux Klan, characterized Catholic religious convictions as "laws of [a] foreigner [that] are absolutely antagonistic to ours. . . . The Pope's is the only church that is foreign; the only church whose laws antagonize democracy and republican institutions . . . ; the only church whose theology teaches murder, and whose literature is so obscene that she savagely prosecutes [those] who expose it").

without any judicial psychoanalysis of a drafter's heart of hearts."[54] "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."[55]

The resolution also must satisfy the second prong of the *Lemon* test, that its "principal or primary effect must be one that neither advances nor inhibits religion . . . ."[56] Here, the argument seems to be that the resolution has no effect at all, let alone a "principal or primary" one, because it is merely an ineffectual expression of the Board of Supervisors' sentiment and not a compulsory regulation of behavior. That argument cannot stand because of the extensive Establishment Clause jurisprudence where government, arguably with similar ineffectuality, endorses religion, and the mere endorsement is deemed unconstitutional.[57]

---

[54] *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005).

[55] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

[56] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[57] *See, e.g.*, *McCreary Cnty.*, 545 U.S. at 844 (display of Ten Commandments); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer before football game); *Lee v. Weisman*, 505 U.S. 577 (1992) (religious invocation at school graduation); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (crèche display at a courthouse); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence or voluntary prayer at school); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (Bible reading at school); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer at school); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (cross on public land); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir.

The "effect" prong of the *Lemon* test "asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[58] That is to say, a mere message of disapproval, even in the absence of any coercion, suffices for an Establishment Clause violation under *Lemon*. If the government action conveys a message of disapproval of religion, then it violates the Establishment Clause.[59] The "message" in the resolution, unlike, say, the message that might be inferred from some symbolic display, is explicit: a Catholic doctrine duly communicated by the part of the Catholic church in charge of clarifying doctrine is "hateful," "defamatory," "insulting," "callous," and "discriminatory," showing "insensitivity and ignorance," the Catholic Church is a hateful foreign meddler in San Francisco's affairs, the Catholic Church ought to "withdraw" its religious directive, and the local archbishop should defy his superior's directive. This is indeed a "message of . . .

1996)(same); *Graham v. Deukmejian*, 713 F.2d 518(9th Cir. 1983) (disciplining physicians who performed surgery in accord with religious beliefs); *see also Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) (suggesting that even though government expression is not impeded by the Free Speech Clause, "government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses").

[58] *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)(Justice O'Connor's rationale was later adopted by the Court in *Wallace*, 472 U.S. at 56).

[59] *Id.*

disapproval." And that is all it takes for it to be unconstitutional.[60]

As for entanglement, the resolution explicitly entangles itself in church governance. The City would entangle itself with judicial hierarchy, albeit not unconstitutionally, by urging a district judge to defy the court of appeals. And San Francisco entangles itself with the Catholic hierarchy when it urges the local archbishop to defy the cardinal. It is a dramatic entanglement to resolve that the Cardinal "as head of the Congregation for the Doctrine of the Faith" should withdraw his directive. The Catholic Church, like the myriad other religions that have adherents in San Francisco, is entitled to develop and propagate its faith without assistance and direction from government.[61] If the faith leads to actions contrary to San Francisco policy, like not placing children for adoption with homosexual couples, the city may abjure use of its institutions to place children, but it may not entangle itself with development of Catholic religious doctrine.[62]

---

[60] *Id.*

[61] *See Cnty. of Allegheny*, 492 U.S. at 590 ("[T]oday [the Establishment and Free Exercise Clauses] are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience." (internal quotation marks and citation omitted)).

[62] Though Henry II and Thomas Becket, as well as Henry VIII and Thomas More, explored the consequences of governmental direction to Church leaders and religious followers respecting their conformance with their Church's directives, we Americans,

The half-millennium-old Congregation for the Doctrine of the Faith is entitled, under our Constitution, to develop religious doctrine free of governmental interference.

Lemon requires government to satisfy all three prongs to avoid an Establishment Clause violation.[63] Even if we were to conclude that San Francisco satisfied one or two of them, it would not satisfy all three. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[64] Messages of endorsement or disapproval "make religion relevant, in reality or public perception, to

---

since long before *Lemon*, have rejected what Madison called "intermeddl[ing]" in church affairs. *Lemon*, 403 U.S. at 635 (Douglas, J., concurring) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* para. 11 (1785)); *see also* James Madison, Address to the Convention of Virginia (June 12, 1788), *reprinted in* 3 *The Debates in the Several State Conventions, On the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* 330 (Jonathan Elliot ed., 1888) ("There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation."). In contrast to such intermeddling, the high school case about "Ave Maria" at graduation cited by Judge Silverman, *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), did not involve any attack on religion, just an avoidance of what might have appeared to be a governmental endorsement of religion. *Id.* at 1098-99.

[63] *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("State action violates the Establishment Clause if it fails to satisfy any of [the *Lemon* test] prongs.").

[64] *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

status in the political community."[65] It is an "established principle that the government must pursue a course of complete neutrality toward religion."[66] The "[Establishment] Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' "[67]

The Establishment Clause might arguably have been limited, long ago, to prohibiting something like the Church of England, where taxes support the church and the government appoints its head, the Archbishop of Canterbury. Or the clause might have been limited to laws imposing fines for failure to attend church at proper times.[68] But it has not been so limited. The Establishment Clause as it has developed may be violated even by government action that is no more than expression of a sentiment, as by displays of religious symbols on government property. None of these violations compel anyone to do anything or refrain from anything, but they are the usual subjects of Establishment Clause prohibition. The Court has

---

[65] *Id.*

[66] *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

[67] *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 574 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

[68] *See, e.g.*, *The Laws and Liberties of Massachusetts* 20 (Max Farrand ed., 1929) (1648) (requiring church attendance on the "Lords days" and any other days "as are to be generally kept by the appointment of Authoritie," with anyone who violated this law being required to "forfeit for his absence from everie such publick meeting five shillings").

assiduously avoided limiting its doctrines to endorsement, by saying "endorsement or disapproval,"[69] so disapproval is as much a violation as endorsement. For the government to resolve officially that "Catholic doctrine is wrong," is as plainly violative of the Establishment Clause as for the government to resolve that "Catholic doctrine is right."

No practical or fair reading could construe the Establishment Clause as prohibiting only government endorsement and not government condemnation of religion. Though it is hard to imagine that government condemnation of the Catholic Church would generate a pogrom against Catholics as it might at another time or for a religion with fewer and more defenseless adherents, the risk of serious consequences cannot be disregarded.[70] Vandals might be emboldened by knowledge that their government agrees that the Catholic Church is hateful and discriminatory. Parishioners might be concerned about driving their car to Mass for fear that it might be keyed in the parking lot. Zoning officials might be emboldened to

---

[69] *See Cnty. of Allegheny*, 492 U.S. at 620; *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985); *Wallace*, 472 U.S. at 61.

[70] San Francisco is quite a metropolitan city, with many people coming from other countries than our own. Some of those countries persecute their religious minorities — including Christians. *See Lolong v. Gonzales*, 400 F.3d 1215, 1217-18, 1221-22 (9th Cir. 2005) (describing how Christians are a persecuted minority in Indonesia), *rev'd*, 484 F.3d 1173 (9th Cir. 2007) (en banc). An official resolution by a government in the United States condemning a Christian religious denomination would not put American Catholics in fear of a pogrom, but might put immigrants from some other countries in fear of what a government hostile to their church might someday do to them.

deny variances and building permits on grounds they might not apply to other churches. Catholic city employees might fear for their promotions if they show too much religiosity, as by coming to work on Ash Wednesday with ash crosses on their foreheads. There are very good reasons why the Constitution directs government to stay out of religious matters.

Our Founding Fathers were well aware of the strife in Europe during the Thirty Years War, and in England in the English Revolution, over religion. They put together a nation of Protestants of various disagreeing sects, Catholics, and Jews, by excluding government from religion. The exclusion was not anticlerical, and did not invite government hostility to any church. Our revolution, unlike the French, Mexican, or Russian revolutions, had no element of anticlericalism. Our Bill of Rights established freedom of religion, not hostility to or establishment of any religion.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.
>
> . . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of

> opinion or force citizens by word or act their faith therein.[71]

Yet the San Francisco Board of Supervisors took upon itself authority to "prescribe what shall be orthodox" in Catholic doctrine. Government cannot constitutionally prescribe a religious orthodoxy and condemn heresy on homosexuality, or anything else. "[N]either Pagan nor Mahometan, nor Jew, ought to be excluded from the civil rights of the commonwealth because of his religion."[72] America allows both loyalty to faith and first-class citizenship.

IV. Conclusion

[8] Although three of us would reverse, a majority of this court concludes that we should affirm, either on standing grounds or on the merits. Accordingly, the judgment of the district court is **AFFIRMED**.

SILVERMAN, Circuit Judge, with whom THOMAS and CLIFTON, Circuit Judges, join, concurring:

I agree with Judge Kleinfeld that the plaintiffs have standing to sue, and therefore join Parts I and II of his opinion. However, we part company when it comes to the merits of the plaintiffs' claims. In my opinion, the district court correctly dismissed the

---

[71] *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 642 (1942).

[72] John Locke, *A Letter Concerning Toleration* 56 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689).

plaintiffs' lawsuit because duly-elected government officials have the right to speak out in their official capacities on matters of secular concern to their constituents, even if their statements offend the religious feelings of some of their other constituents. The key here is that the resolution in question had a primarily secular purpose and effect and addressed a matter of indisputably civic concern.

Government speech or conduct violates the Establishment Clause's neutrality-only requirement when it: (1) has a predominantly religious purpose; (2) has a principal or primary effect of advancing or inhibiting religion; or (3) fosters excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). We have previously applied the tripartite *Lemon* test to governmental expressions of alleged religious hostility. *See Am. Family Ass'n v. City & County of S.F.*, 277 F.3d 1114, 1121 (9th Cir. 2002); *see also Vernon v. City of L.A.*, 27 F.3d 1385, 1396 (9th Cir. 1994). The resolution in this case satisfies each of *Lemon*'s three prongs.

There is no denying that marriage and adoption are secular issues regulated by state law, even though they can (but do not necessarily) involve religious ceremonies and traditions. The same-sex marriage debate surely has religious significance to many, but it is also a hot-button political issue of considerable secular interest to the defendants' constituents at large. The defendants passed their March 2006 resolution in direct response and contemporaneous to Cardinal Levada's March 2006 directive. The title of the resolution refers explicitly to Cardinal Levada's directive to local Catholic charities to "stop placing children in need of adoption in homosexual

households." Its stated purpose is to "urge[ ] Cardinal William Levada . . . to withdraw [t]his . . . directive." The reasons given are purely secular, not theological. For example, the resolution contains nothing like, "The Church has misread the Bible," or "*Our* God approves of same-sex marriage."

I agree with the district court that under *Lemon*'s first prong (the purpose prong), an "objective observer" who is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show" would conclude that the defendants acted with a predominantly secular purpose, i.e., to promote equal rights for same-sex couples in adoption and to place the greatest number of children possible with qualified families. Moreover, San Francisco has a well-known and lengthy history of promoting gay rights. *See Catholic League v. City & County of S.F.*, 464 F. Supp. 2d 938, 946 & n.1 (taking judicial notice of other San Francisco resolutions promoting the rights of same-sex couples). A reasonable observer would consider the resolution in the context of both this history and the Catholic Church's unabashed efforts to frustrate same-sex adoption in San Francisco, the defendants' political bailiwick. In light of this context, such an observer would conclude that the primary purpose behind the resolution was secular — to promote same-sex adoption.

Under *Lemon*'s second prong (the effect prong), an objectively reasonable observer familiar with the history of the government practice at issue here would conclude that the primary effect of the resolution was to promote same-sex adoption. *See Am. Family*, 277 F.3d at 1122. Read as a whole, *see id.*, the resolution's

primary message is that "same-sex couples are just as qualified to be parents as are heterosexual couples" and that placing children in homosexual households does not do violence to them. An objectively reasonable observer would conclude, as they would in the context of the purpose prong, that both San Francisco's history of promoting gay rights and the timing of the defendants' resolution, incendiary though it may be, is aimed at expressing the defendants' position on the secular issue of same-sex adoption.

Finally, under *Lemon*'s third prong (the entanglement prong), this resolution does not excessively entangle the defendants with religion. It was an isolated, non-binding expression of the Board of Supervisors' opinion on a secular matter, which the plaintiffs have not alleged even potentially interfered with the inner workings of the Catholic Church. This type of one-off entreaty does not violate *Lemon*'s third prong; "[a]dministrative entanglement typically involves comprehensive, discriminating, and continuing surveillance of religion." *Vernon*, 27 F.3d at 1399. To like effect is *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), holding that a school district's single request that a student not play "Ave Maria" at graduation, because of multiple complaints about religious music, did not constitute excessive entanglement with religion.

In *American Family*, we concluded that the Board of Supervisors did not violate the Establishment Clause by passing resolutions similar to those at issue here. The resolutions in *American Family* criticized a religious political coalition for its moral position on homosexuality, assailed the scientific and sociological bases for the coalition's position, and urged secular

television stations not to support the coalition's message of intolerance. *See Am. Family*, 277 F.3d at 1119-20. One of the coalition's ads, placed in the San Francisco Chronicle, proclaimed that "God abhors any form of sexual sin," including homosexuality. *Id.* at 1119. The Board passed the resolutions in response to that ad, and others. *Id.* at 1119-20.

The plaintiffs would have us distinguish the resolution in this case from the one in *American Family* on the grounds that the Board directed this resolution toward a religious entity rather than a political one. But the mere fact that a resolution calls out a church or a clergyman cannot carry the day. Otherwise, the Establishment Clause would gag secular officials from responding to religious entities even when those entities have chosen to enter the secular fray.

We would have a different case on our hands had the defendants called upon Cardinal Levada to recant his views on transubstantiation, or had urged Orthodox Jews to abandon the laws of kashrut, or Mormons their taboo of alcohol. Those matters of religious dogma are not within the secular arena in the way that same-sex marriage and adoption are. The speech here concerns a controversial public issue that affects the civic lives of the citizens of San Francisco, religious and nonreligious alike. I would not construe the First Amendment to prohibit elected officials from speaking out, in their official capacities, on matters of such clearly civil import, even if their speech is insolent, stupid, or worse. A church has every right to take a firm moral position on secular issues, but it has no right to prevent public officials from criticizing its

position on those secular issues — especially when one of its clergy fires the first salvo.

I would affirm.

GRABER, Circuit Judge, joined by KOZINSKI, Chief Judge, and RYMER, HAWKINS, and McKEOWN, Circuit Judges, dissenting on the issue of jurisdiction but concurring in the judgment:

Plaintiffs Catholic League for Religious and Civil Rights ("Catholic League"), Dr. Richard Sonnenshein, and Valerie Meehan brought this 42 U.S.C. § 1983 action against Defendants City and County of San Francisco, San Francisco Board of Supervisors President Aaron Peskin, and Supervisor Tom Ammiano, challenging their enactment of Resolution of March 21, 2006, No. 168-06. Plaintiffs argue that the resolution violates the Establishment Clause of the First Amendment by impermissibly attacking Plaintiffs' religion, Catholicism. The resolution concerns a Catholic cardinal and his directive to Catholic Charities CYO of San Francisco ("Catholic Charities"), a non-profit provider of social services, on the topic of adoption by same-sex couples. I would not reach the merits of this dispute. Instead, I would hold that we lack jurisdiction over this case because Plaintiffs lack Article III standing.

The doctrine of standing requires that Plaintiffs demonstrate a concrete and particularized injury caused by the passage of Resolution No. 168-06. But the resolution plainly applies (albeit in a non-binding, hortatory way) only to persons and entities other than Plaintiffs. Plaintiffs do not allege any form of concrete and particularized injury resulting from the resolution;

they allege only a deep and genuine offense. It is a bedrock principle of federal courts' limited jurisdiction that a person's deep and genuine offense to a defendant's actions, without more, generally does not suffice to confer standing. Here, Plaintiffs do not allege more.

The doctrine of standing not only ensures robust litigation by interested parties, but also protects the interests of those potential plaintiffs who have chosen, for whatever reason, not to bring suit. Plaintiffs' allegations suggest that several entities and individuals—including Cardinal Levada, Archbishop Niederauer, and Catholic Charities—likely have standing. Just as much as we must resolve all cases within our jurisdiction, we also must respect the decision by those persons and entities not to sue.

Because a majority of the en banc panel holds that we have jurisdiction, I dissent from that portion of the disposition. But, because I agree with the judgment affirming the district court's dismissal of the action, I concur in the judgment.

FACTUAL AND PROCEDURAL HISTORY

Catholic Charities is an agency of the San Francisco Archdiocese of the Catholic Church. It operates as a non-profit provider of social services in the Bay Area. Until 2006, Catholic Charities' services included placing children with adoptive parents.

In March 2006, Cardinal William Joseph Levada, the head of the Congregation for the Doctrine of the Faith, issued a directive to Catholic Charities. The directive instructed Catholic Charities to stop placing

children in need of adoption with same-sex couples. The San Francisco Board of Supervisors responded by unanimously adopting a non-binding resolution:

> [Resolution urging Cardinal Levada to withdraw his directive to Catholic Charities forbidding the placement of children in need of adoption with same-sex couples]
>
> **Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.**
>
> WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and
>
> WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

Resolution of Mar. 21, 2006, No. 168-06 (bracketed sentence in original). According to the complaint, Defendants also threatened to withhold funding from Catholic Charities if that organization refused to place children with same-sex couples.

Soon thereafter, Plaintiffs brought this action. Plaintiffs allege that the resolution violates the Establishment Clause of the First Amendment. They seek "nominal damages, a declaration that this anti-Catholic resolution is unconstitutional, and a permanent injunction enjoining this and other official resolutions, pronouncements, or declarations against Catholics and their religious beliefs." In the complaint, Plaintiffs identify themselves and their injuries as follows:

> Plaintiff Catholic League is the nation's largest Catholic civil rights organization. Founded in 1973, the Catholic League defends the right of Catholics— lay and clergy alike—to participate in American public life without defamation or discrimination. The Catholic League has approximately 6,000 members who reside in the City and County of San Francisco. The Catholic League and its members object to, and have been injured by, the anti-Catholic resolution adopted by Defendants. Defendants' anti-Catholic resolution attacks the deeply held religious beliefs of Catholics, conveys the impermissible, state-sponsored message of disapproval of and hostility toward the Catholic religion, and sends a clear message to Catholic League, its members, and others who are adherents to the Catholic faith that they are outsiders, not full members of the political community.
>
> Plaintiff Dr. Richard Sonnenshein is a resident of the City and County of San Francisco. He is a devout Catholic, and he objects to and has been injured by the

anti-Catholic resolution adopted by Defendants. Defendants' anti-Catholic resolution attacks Plaintiff Sonnenshein's deeply held religious beliefs, conveys the impermissible, state-sponsored message of disapproval of and hostility toward the Catholic religion, and sends a clear message to Plaintiff Sonnenshein and others who are adherents to the Catholic faith that they are outsiders, not full members of the political community. Plaintiff Sonnenshein is a member of the Catholic League.

Plaintiff Valerie Meehan is a resident of the City and County of San Francisco. She is a third-generation San Franciscan and a devout Catholic. Plaintiff Meehan objects to and has been injured by the anti-Catholic resolution adopted by Defendants. Defendants' anti-Catholic resolution attacks Plaintiff Meehan's deeply held religious beliefs, conveys the impermissible, state-sponsored message of disapproval of and hostility toward the Catholic religion, and sends a clear message to Plaintiff Meehan and others who are adherents to the Catholic faith that they are outsiders, not full members of the political community.

Plaintiffs Sonnenshein and Meehan have had direct contact with and have been injured by the offending anti-Catholic resolution, which stigmatizes Plaintiffs on account of their religious beliefs and conveys a message to them that they are outsiders, not full members of the political community. Plaintiffs Sonnenshein and Meehan, who are citizens and municipal taxpayers of Defendant City and County of San

> Francisco, have been injured by the abuse of government authority and the misuse of the instruments of government to criticize, demean, and attack their religion and religious beliefs, thereby chilling their access to the government. As a result of Defendants' anti-Catholic resolution, Plaintiffs Sonnenshein and Meehan will curtail their activities to lessen their contact with Defendants, thereby causing further harm. Plaintiff Catholic League, through its members, has been similarly injured and harmed by Defendants' anti-Catholic resolution.

(Paragraph numbering omitted.)

Defendants filed a motion to dismiss for failure to state a claim. Defendants argued, on the merits, that the resolution does not violate the Establishment Clause. The district court agreed. In a published opinion, the district court held that the resolution does not violate the Establishment Clause and, therefore, dismissed the case. *Catholic League for Religious & Civil Rights v. City of San Francisco*, 464 F. Supp. 2d 938 (N.D. Cal. 2006).

Plaintiffs timely appealed. In a published opinion, a three-judge panel of our court unanimously affirmed, agreeing with the district court that the resolution does not violate the Establishment Clause. *Catholic League for Religious & Civil Rights v. City of San Francisco*, 567 F.3d 595, 608 (9th Cir. 2009). We granted rehearing en banc. 586 F.3d 1166 (9th Cir. 2009).

The parties never raised the issue of Plaintiffs' Article III standing, and neither the district court nor the panel addressed the issue. Shortly before the date of our en banc oral argument, we sua sponte directed the parties to file simultaneous briefs on the issue of Article III standing and to be prepared to discuss the issue at oral argument.

STANDARD OF REVIEW

We review de novo the district court's dismissal for failure to state a claim. *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009).

DISCUSSION

Before reaching the merits of any case, including an Establishment Clause challenge, we must ensure that the plaintiff has Article III standing. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). "The question of standing is not subject to waiver . . . : We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us." *United States v. Hays*, 515 U.S. 737, 742 (1995) (brackets and internal quotation marks omitted). "This obligation to notice defects in . . . subject-matter jurisdiction assumes a special importance when a constitutional question is presented. In such cases we have strictly adhered to the standing requirements . . . ." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986).[1]

---

[1] For those reasons, it is incorrect to state that Defendants have "conceded standing." Maj. op. at 17365. As the majority elsewhere

A. *Article III Standing in Establishment Clause Cases*

The Article III standing requirements "are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress." *Newdow*, 542 U.S. at 12 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Familiar though the requirements may be, the Supreme Court also has cautioned that standing is not a precise doctrine. *See id.* at 11 ("The standing requirement is born partly of 'an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.' " (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (stating that "the concept of 'Art. III standing' has not been defined with complete consistency . . . [and] cannot be reduced to a one-sentence or one-paragraph definition").

That imprecision is manifest in the Establishment Clause context. Courts regularly have noted that it can be difficult to determine whether an Establishment Clause plaintiff has alleged an "injury in fact" for purposes of Article III standing. *See, e.g.*, *Cooper v.*

---

recognizes, a party may not "concede" that we have subject matter jurisdiction. (A majority of the en banc panel has voted for Judge Kleinfeld's opinion with respect to standing but not with respect to other Parts. Because I cite only those Parts of Judge Kleinfeld's opinion that command a majority, I refer to his opinion throughout as the majority opinion.)

U.S. Postal Serv., 577 F.3d 479, 489-90 (2d Cir. 2009) ("[S]o far the [Supreme] Court has announced no reliable and handy principles of analysis. . . . Lower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached. . . . In short, there is uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context."), *cert. denied*, 130 S. Ct. 1688 (2010); *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) ("The concept of a 'concrete' injury is particularly elusive in the Establishment Clause context."); *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1085 (4th Cir. 1997) (same); *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991) (same); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987) (same). The difficulty stems, at least in part, from the nature of the asserted "injury in fact." Unlike most other types of cases, in which the plaintiff suffers a physical injury or a pecuniary loss, the plaintiff in an Establishment Clause case usually does not suffer those types of harm. *Vasquez*, 487 F.3d at 1250-51; *Suhre*, 131 F.3d at 1086. Instead, the plaintiff in an Establishment Clause case typically asserts only that the government's action has caused an injury in fact to "noneconomic interests of a spiritual, as opposed to a physical or pecuniary, nature." *Vasquez*, 487 F.3d at 1250-51; *see Suhre*, 131 F.3d at 1086 (holding that "'the spiritual, value-laden beliefs of the plaintiffs' are often most directly affected by an alleged establishment of religion" (quoting *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1102 (11th Cir. 1983) (per curiam))).

The Supreme Court has made clear that this sort of harm— injury to interests of a spiritual nature—can

suffice to establish an "injury in fact" for purposes of Article III standing. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause . . . ."). But it is equally clear that an asserted injury of that nature does not grant the plaintiff carte blanche to federal-court resolution of Establishment Clause challenges. *Valley Forge*, 454 U.S. at 485.

Even though the injury is spiritual in nature, the injury also must be *direct* and *personal* to the particular plaintiff. " 'The essence of the standing inquiry is whether the [plaintiffs] have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Larson v. Valente*, 456 U.S. 228, 238-39 (1982) *(quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978)). "[B]ut standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. "[A]t an irreducible minimum, Art. III requires the [plaintiff] to 'show that he *personally* has suffered some actual or threatened injury . . . .' " *Id.* at 472 (emphasis added) (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)); *see also Lujan*, 504 U.S. at 560 & n.1 (holding that an "injury in fact" "must affect the plaintiff in a *personal and individual* way" (emphasis added)). A plaintiff " 'must allege facts showing that he is himself adversely affected . . . [in part] to put the decision as to whether review will be sought in the hands of those who have a *direct* stake in the

outcome.' " *Valley Forge*, 454 U.S. at 473 (emphasis added) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)). The requirement of a direct and personal injury in part "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Id.*

In *Valley Forge*, 454 U.S. at 467-68, the plaintiffs brought an Establishment Clause challenge to a transfer of land from the federal government to a religious organization. The plaintiffs had never visited the land in question, nor did they have any other direct connection to it. The Court held that the plaintiffs "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . ." *Id.* at 485 (emphasis omitted).

The plaintiffs in *Valley Forge* maintained that the Court's earlier cases had held "that any person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing." *Id.* at 486 n.22. The Court disagreed and illustrated the plaintiffs' error by reference to two cases raising challenges to required Bible readings in public schools: *School District v. Schempp*, 374 U.S. 203 (1963); and *Doremus v. Board of Education*, 342 U.S. 429 (1952). In *Doremus*, the Court lacked jurisdiction because the student had graduated but, in *Schempp*, the student was still in school, so the Court held that the plaintiffs had standing. *Compare Doremus*, 342 U.S. at 432-33, *with Schempp*, 374 U.S. at 224 n.9. In *Valley Forge*, the Court explained: "The plaintiffs in *Schempp* had

standing, not because their complaint rested on the Establishment Clause—for as *Doremus* demonstrated, that is insufficient—but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22; *see also Schempp*, 374 U.S. at 224 n.9 ("The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed.").

The courts have developed a substantial body of case law interpreting *Valley Forge*'s holding that the plaintiff must allege a direct and personal injury other than "the psychological consequence presumably produced by observation of conduct with which one disagrees."[2] 454 U.S. at 485. Below, I describe three general categories of cases. First, and most directly relevant here, I describe cases involving a specific governmental policy or statutory provision, in which the plaintiff challenges the policy or provision directly. As discussed below, the cases have held that a plaintiff has standing to challenge the policy or provision only if the plaintiff proves that the enactment applies

---

[2] We have rejected the proposition that the plaintiffs in *Valley Forge* lacked standing because their offense was grounded in ideological, rather than religious, beliefs. *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004), *on appeal after remand*, 527 F.3d 758 (9th Cir. 2008), *rev'd and remanded on other grounds*, 130 S. Ct. 1803 (2010). We held that, in Valley Forge, the Supreme Court "drew a distinction between abstract grievances and personal injuries, not ideological and religious beliefs." *Id.* Significantly, all cases interpreting *Valley Forge*, discussed *infra*, have rejected the proposition that abstract harm to religious beliefs alone is sufficient to confer standing.

directly to him or her. A generalized objection to the policy or provision is insufficient.

The requirement that the plaintiff demonstrate that the policy or provision applies directly to him or her is consistent with the courts' approach in the second and third categories of cases. In religious exercise cases, the courts have addressed situations in which the plaintiff challenges some form of religious invocation at a public gathering or ceremony. The courts have held that a plaintiff has standing to challenge a religious exercise only if the plaintiff is directly subjected to the unwelcome exercise. Similarly, in the religious display cases, the courts have addressed situations in which the plaintiff challenges a religious display on public property. The courts have held that a plaintiff has standing to challenge a religious display only if the plaintiff has altered his or her behavior or if the plaintiff has direct and unwelcome contact with the display.

Those principles—established through longstanding and consistent analysis by the Supreme Court, by us, and by our sister circuits—constitute an important source of law and guide our analysis here. Accordingly, I cannot understand the majority's assertion that my opinion requires that these "cases must somehow be distinguished . . . or overruled." Maj. op. at 17370. In no way do I suggest that these cases do not "retain their vitality" or that they "are overruled." *Id.* To the contrary, I extract from these cases certain principles of law that we must apply here, to this case. Accordingly, my analysis of standing is entirely consistent with the existing body of law. It is the majority opinion that fails to explain how a conclusion of standing in this case is consistent with

that substantial body of law—a body of law discussed in detail in this opinion but referenced only in passing, in list form, in his.

Furthermore, the list in majority opinion identifies the constitutional issues that either the Supreme Court or we have addressed in an earlier case. Maj. op. at 17367-68. The majority then concludes that, because the courts have addressed those issues, surely a finding of standing in this case is consistent with those cases. *See id.* at 17369-70 ("If we conclude that plaintiffs in the case before us have standing, we need not decide whether those cases retain their vitality or are overruled, because our conclusion would be consistent with them."). But standing focuses on *the plaintiff*, not on *the issue*. That this case raises an interesting constitutional issue similar to issues addressed in previous cases is, quite simply, beside the point.[3] The relevant questions are whether the plaintiff has suffered a cognizable injury and whether that injury is redressable. It is to those relevant questions that I now turn.

---

[3] I could not agree more that "[s]tanding is emphatically not a doctrine for shutting the courthouse door to those whose causes we do not like." Maj. op. at 17367. Indeed, at least some of those who join this opinion might have been inclined to agree that the resolution violates the Establishment Clause, had a proper plaintiff brought this case. Equally important, however, standing is emphatically not a doctrine for opening the courthouse door to everyone who wishes us to resolve their questions of constitutional law—however academically interesting those questions may be.

1. *Governmental Policies or Statutory Provisions*

In many cases, including recent ones, plaintiffs have raised Establishment Clause challenges to specific governmental policies or statutory provisions. *See, e.g.*, *Larson*, 456 U.S. at 230-34 (state statute imposing registration and reporting requirements on "religious organizations"); *Newdow v. Lefevre*, 598 F.3d 638, 641 (9th Cir. 2010) (federal statute declaring the national motto "In God We Trust"); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1012-13 (9th Cir. 2010) (federal statute codifying the pledge of allegiance as including the words "under God"); *Chaplaincy of Full Gospel Churches v. U.S. Navy (In re Navy Chaplaincy)*, 534 F.3d 756, 758-59 (D.C. Cir. 2008) (federal policy concerning navy chaplains' retirement benefits), *cert. denied*, 129 S. Ct. 1918 (2009); *Graham v. Deukmejian*, 713 F.2d 518, 519 (9th Cir. 1983) (state policy requiring blood transfusions during certain surgeries, contrary to religious beliefs of Jehovah's Witnesses); *Flora v. White*, 692 F.2d 53, 54 (8th Cir. 1982) (per curiam) (state constitutional provision requiring certain officeholders and witnesses to profess their belief in the existence of "a God"); *see also Am. Family Ass'n v. City of San Francisco*, 277 F.3d 1114, 1119-20 (9th Cir. 2002) (municipal board of supervisors' formal disapproval of an advertising campaign by religious groups);[4] *cf. Smelt v. Cnty. of*

---

[4] In *American Family*, we did not discuss standing but, rather, asserted jurisdiction over the Establishment Clause issue sub silentio. Sub silentio holdings on jurisdiction occupy an interesting place in our jurisprudence. We cannot ignore such holdings. *See E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (" 'While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*,

Orange, 447 F.3d 673, 676-77 (9th Cir. 2006) (challenge to federal statute concerning same-sex marriages on other constitutional grounds). The courts have held that, if the statute or policy applies to the plaintiff in a concrete manner, then the plaintiff has standing. *See Larson*, 456 U.S. at 241 ("The threatened application of [the statutory provision] to the Church surely amounts to a distinct and palpable injury to [the plaintiffs]: It disables them from soliciting contributions in the State of Minnesota unless the Church complies with registration and reporting requirements that are hardly *de minimis*."); *Graham*, 713 F.2d at 519 ("The Witnesses must show that they have suffered injury, or that future injury is threatened, as a result of the defendants' conduct. The Witnesses have so alleged, claiming that blood transfusions are contrary to their religious beliefs and that California's actions threaten to discourage physicians from performing certain operations without such transfusions." (citation omitted)). If the plaintiffs are not subject to the challenged provision, however,

---

neither should we disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases." (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962))). But their import necessarily is difficult to assess because, by definition, there is no reasoning in the opinion that we may apply to the case at hand. In any event, no difficulty is presented here, because the facts of *American Family* plainly establish that the standing requirements I discuss in text were met in that case (which may explain our silence on the issue). For instance, I take judicial notice of the complaint in *American Family*. The plaintiffs there alleged the government's policy statement was directed specifically at the plaintiffs and that the statement prevented the plaintiffs from placing certain television advertisements that they otherwise would have placed. In short, the policy statement applied directly to the plaintiffs.

they lack the requisite particularized harm. *See Lefevre*, 598 F.3d at 643 (holding that the plaintiff lacked standing to challenge the statute declaring the national motto "In God We Trust" because the allegation that, because of the statute, the plaintiff is a "political outsider" and suffers "a stigmatic injury" "is insufficient to confer standing"); *Rio Linda*, 597 F.3d at 1016 (holding that the plaintiff lacked standing to challenge the federal statute codifying the pledge of allegiance as including the words "under God" because the plaintiff sustained no personal injury where "nothing in the Pledge [or the statute codifying it] actually requires anyone to recite it"); *In re Navy Chaplaincy*, 534 F.3d at 758 (holding that navy chaplain plaintiffs could not challenge the U.S. Navy's alleged policy of discrimination in its retirement system, in favor of Catholic navy chaplains, because the plaintiffs themselves had not suffered discrimination); *Flora*, 692 F.2d at 54 (holding that atheist plaintiffs lacked standing to challenge a discriminatory state constitutional provision because the provision had never been applied to the plaintiffs); *see also Smelt*, 447 F.3d at 683-86 (holding that plaintiff same-sex couple lacked standing to challenge federal statute denying benefits to married same-sex couples, because the plaintiffs were not married under state law and had not been denied any federal benefits or rights).

2. *Religious Exercise Cases*

In a second category, plaintiffs have brought Establishment Clause challenges to some form of religious invocation at a public gathering or ceremony. *See, e.g.*, *Schempp*, 374 U.S. at 205-06 (daily scripture readings in public school); *Doremus*, 342 U.S. at 430

(same); *Rio Linda*, 597 F.3d at 1012-13 (recitations of the pledge of allegiance in public school); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1266 (11th Cir. 2008) (invocations at beginning of county planning meetings); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496-99 (5th Cir. 2007) (en banc) (invocations at school board meetings); *Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 607-08 (8th Cir. 2003) (scheduled invocation and benediction at high school graduation); *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 291 (5th Cir. 2001) (prayers at public school); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 791 (9th Cir. 1999) (en banc) (student prayers at high school graduations); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (student prayers at high school football games); *Lee v. Weisman*, 505 U.S. 577, 580-83 (1992) (prayers at graduation ceremonies); *Wallace v. Jaffree*, 472 U.S. 38, 40-42 (1985) (school prayer and meditation); *Engel v. Vitale*, 370 U.S. 421, 422-23 (1962) (school prayer).[5] In *Valley Forge*, 454 U.S. at 487 n.22, the Court examined *Doremus* and *Schempp* and explained that a plaintiff has standing if he or she has actually been "subjected to unwelcome religious exercises." Accordingly, a plaintiff who did not attend an event at which the religious invocation occurred had never actually been "subjected to

---

[5] In the four cases following the "see also" indicator, I list the cases in which the Supreme Court did not discuss standing but, rather, asserted jurisdiction over the Establishment Clause issue sub silentio. As explained above, *supra* note 4, sub silentio holdings on jurisdiction can present interesting challenges. But, here, there are no difficulties because the facts of the listed cases plainly establish that the standing requirements I discuss in text were met in those cases (which may explain the Court's silence on the issue of standing).

unwelcome religious exercises," *id.*, and therefore lacked standing. *See Tangipahoa Parish*, 494 F.3d at 497-98 (holding that the plaintiffs lack standing because "there is no evidentiary proof that any of the [plaintiffs] ever attended a school board session at which a prayer . . . was recited"); *see also Madison*, 177 F.3d at 797 (holding that a parent plaintiff did not have standing where "she does not claim that she will attend another graduation ceremony in the future"). When plaintiffs regularly attend events at which an invocation occurs, however, the plaintiffs have standing because they have been subjected to unwelcome religious exercises. *See Pelphrey*, 547 F.3d at 1279-80 (regular attendee at county planning commission meetings); *Ouachita Parish*, 274 F.3d at 292 (students at public schools exposed to daily prayer).

The Eighth Circuit considered an interesting combination of these two extremes in *Norfolk*. There, the public school announced to the student body, at a mandatory graduation rehearsal, that the impending graduation ceremony would include an invocation and benediction. *Norfolk*, 340 F.3d at 607. After the ACLU and a parent expressed concern, the school dropped the invocation and benediction from the scheduled ceremony. *Id.* During the ceremony, however, a member of the school board interrupted his speech to lead the audience through a recitation of the Lord's Prayer. *Id.* at 608. An offended student and his mother sued the school district and certain members of the school board. *Id.*

The court had "little trouble" concluding that the plaintiffs had standing to challenge the actions of the School Board member who read the prayer (and the

other defendants, on the theory that they were complicit). *Id.* at 609. After all, the plaintiffs "were subjected to an unwelcome religious recitation at a school function." *Id.* But whether the plaintiffs had standing to challenge the school's "past policy of allowing prayer at graduation ceremonies[ ] present[ed] a much closer issue." *Id.* The court acknowledged that the school's announcement to the students at the mandatory rehearsal that, consistent with the school's tradition, the graduation ceremony would include an invocation and benediction constituted some personal contact with an endorsement of religion. *Id.* at 609-10. Nevertheless, the court concluded that the plaintiffs lacked standing to pursue this claim, both because the plaintiffs' contact with endorsement was insufficient and because the plaintiffs did not allege that the past policy caused them any particularized injury. *Id.*

3. *Religious Display Cases*

In a legion of cases, plaintiffs have challenged religious displays. *See, e.g.*, *Lefevre*, 598 F.3d at 640 (national motto "In God We Trust" on the nation's coins and currency); *ACLU of Ky. v. Grayson Cnty.*, 591 F.3d 837, 840-41 (6th Cir. 2010) (Ten Commandments in county courthouse); *Cooper*, 577 F.3d at 484 (religious displays at post office); *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 787-88 (10th Cir. 2009) (Ten Commandments on courthouse green), *cert. denied*, 130 S. Ct. 1687 (2010); *Caldwell v. Caldwell*, 545 F.3d 1126, 1128 (9th Cir. 2008) (religious statements on public university's website), *cert. denied*, 129 S. Ct. 1617 (2009); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 783 (9th Cir. 2008) (order) (Boy Scout symbols in public park), *cert.*

denied, 130 S. Ct. 2401 (2010); *Vasquez*, 487 F.3d at 1247-48 (removal of cross on county seal); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1218-19 (10th Cir. 2005) (statue of Roman Catholic bishop displayed at public university in outdoor art show); *Books v. Elkhart Cnty.*, 401 F.3d 857, 858 (7th Cir. 2005) (Ten Commandments on public property); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 487 (6th Cir. 2004) (Ten Commandments on courtroom wall); *Buono*, 371 F.3d at 544 (cross on a hill); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1024-25 (8th Cir. 2004) (Ten Commandments in public park), *adopted in relevant part*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc); *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (Ten Commandments monument at Alabama State Judicial Building); *Adland v. Russ*, 307 F.3d 471, 474-75 (6th Cir. 2002) (Ten Commandments on public property); *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 260 (3d Cir. 2001) (holiday display on public property); *Books v. City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000) (Ten Commandments on front lawn of municipal building); *Suhre*, 131 F.3d at 1084 (Ten Commandments in county courthouse); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 618 (9th Cir. 1996) (per curiam) (51-foot Latin cross on butte in city park); *Doe v. Cnty. of Montgomery*, 41 F.3d 1156, 1157 (7th Cir. 1994) (the words "THE WORLD NEEDS GOD" above entrance to county courthouse); *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 681 (6th Cir. 1994) (painting of Jesus Christ in public school hallway); *Gonzales v. N. Twp. of Lake Cnty.*, 4 F.3d 1412, 1414 (9th Cir. 1993) (crucifix in public park); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1520 (9th Cir. 1993) (giant crosses on public land and on city insignia); *Murray*, 947 F.2d at 149 (cross on city seal); *Hewitt v. Joyner*, 940 F.2d 1561,

1562-63 (9th Cir. 1991) (religious statues in public park); *Harris v. City of Zion*, 927 F.2d 1401, 1402 (7th Cir. 1991) (crosses on city seal); *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1465 (7th Cir. 1988) (Ten Commandments in public park); *Saladin*, 812 F.2d at 688-89 (the word "Christianity" on city seal); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir. 1986) (lighted cross on public property); *Hawley v. City of Cleveland*, 773 F.2d 736, 737 (6th Cir. 1985) (chapel in public airport); *Rabun Cnty.*, 698 F.2d at 1100-01 (lighted cross in a public park); *see also McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 851 (2005) ("large, gold-framed copies" of the Ten Commandments at county courthouses "posted in a very high traffic area of the courthouse" (internal quotation marks omitted)); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (Ten Commandments monolith standing "6-feet high and 3 1/2-feet wide" in public park); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 578 (1989) (crèche in county courthouse and menorah outside county building); *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (Crèche containing figures "ranging in height from 5 [inches] to 5 [feet]").[6] In each case, the plaintiffs alleged that they were deeply offended by the presence of the religious display on public property and sought its removal.

---

[6] In the four cases following the "see also" indicator, I again list the cases in which the Supreme Court did not discuss standing but, rather, asserted jurisdiction over the Establishment Clause issue sub silentio. As explained above, *supra* note 4, sub silentio holdings on jurisdiction can present interesting challenges. But, here again, as with the cases noted in the preceding footnotes, the facts of the listed cases plainly establish that the standing requirements I discuss in text were met.

The courts consistently have applied the same general legal rules. A plaintiff has standing to challenge a religious display if he or she alleges a change in behavior (for instance, affirmative avoidance of the religious display). *Rabun Cnty.*, 698 F.2d at 1108. But, although an allegation of a change in behavior is sufficient to confer standing, it is not required. *Vasquez*, 487 F.3d at 1251-52; *Suhre*, 131 F.3d at 1087-88; *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Saladin*, 812 F.2d at 692-93.[7] A plaintiff also has standing when he or she has alleged "direct and unwelcome contact" with the religious display. *Grayson Cnty.*, 591 F.3d at 843; *Green*, 568 F.3d at 794; *Books*, 401 F.3d at 861; *City of Plattsmouth*, 358 F.3d at 1030; *accord Lefevre*, 598 F.3d at 642 ("unwelcome direct contact"); *Caldwell*, 545 F.3d at 1132 (same); *Vasquez*, 487 F.3d at 1253 (same); *Ashbrook*, 375 F.3d at 490 ("direct, unwelcome contact"); *Suhre*, 131 F.3d at 1088 ("direct unwelcome contact"). In the absence of "direct and unwelcome contact," however, a plaintiff cannot meet the standing requirements, even if he or she has contact with a religious display and is offended by it: "In certain cases, a plaintiff's contact with an allegedly offensive religious or anti-religious symbol will remain too

---

[7] The Seventh Circuit's position on this point is a bit uncertain. *Compare Zielke*, 845 F.2d at 1467 (suggesting that an allegation that the plaintiff altered behavior is necessary to establish standing), *with Cnty. of Montgomery*, 41 F.3d at 1161 (discussing *Zielke* and suggesting that its holding was not so broad); *see also City of Plattsmouth*, 358 F.3d at 1029 n.7 ("It appears likely the Seventh Circuit has disowned the 'altered behavior' test and distinguished this language contained in *Zielke*." (citing *Cnty. of Montgomery*, 41 F.3d at 1160-61)). At most, the Seventh Circuit constitutes a minority of one circuit.

tenuous, indirect, or abstract to give rise to Article III standing." *Vasquez*, 487 F.3d at 1251; *see also Caldwell*, 545 F.3d at 1132-33 (holding that the plaintiff's injury was insufficient for standing purposes because of the tenuous nature of the connection between a website user and the religious message on a webpage and because her contact with the web site was less forced than in *Vasquez*); *Cnty. of Montgomery*, 41 F.3d at 1161-62 (holding that a lawyer did not have standing to challenge a religious display in a courthouse where the lawyer had not alleged that he would have any contact with the display); *Washegesic*, 33 F.3d at 682 (noting that "psychological harm alone is not always a sufficient injury for standing purposes when contact [with a religious display such as a picture of Jesus Christ in a school's hallway] is indirect"); *Harris*, 927 F.2d at 1406 (holding that "the fact that the plaintiffs may be offended by the seals . . . does not confer standing").

A plaintiff who challenges a religious display meets the "direct and unwelcome contact" requirement by demonstrating some level of frequent or regular contact with the display during the course of the plaintiff's regular routine, such that the plaintiff was "forced" to encounter the display. For example, in *Vasquez*, 487 F.3d at 1251-52, the plaintiff challenged the existence of a cross on a county seal—which he encountered on a regular basis as a county resident *and* county employee. We held that the plaintiff had standing because he "held himself out as a member of the community where the seal is located, as someone *forced* into *frequent regular* contact with the seal, and perhaps most importantly, as someone 'directly affected' by his 'unwelcome direct contact' with the

seal." *Id.* at 1251 (emphases added). We explained further:

> Unlike plaintiffs in *Valley Forge*, who were physically removed from defendant's conduct, Vasquez is a member of the community where the allegedly offending symbol is located, and his contact with the symbol was *frequent and regular*, not sporadic and remote. In fact, . . . the offending symbol "will be displayed on county buildings, vehicles, flags, stationary [sic], forms, commendations, uniforms, and elsewhere through LA County," thereby *forcing* Vasquez into *unwelcome* "daily contact and exposure" of the most pervasive kind. These facts and allegations make Vasquez's status fundamentally different from that of plaintiffs in *Valley Forge*.

Id. at 1252 (emphases added).

As another example, in *Suhre*, 131 F.3d at 1084-85, the plaintiff challenged a display of the Ten Commandments in the main courtroom of the county courthouse. The Fourth Circuit held that the plaintiff had standing because of his regular visits to that courtroom, both as a *frequent* litigant and as a participant in local government meetings (as a plaintiff and witness in past civil actions, as a defendant in criminal actions, and as an attendee at four past meetings of local government). *Id.* at 1090. The court found it relevant that the plaintiff "*must confront* the religious symbolism whenever he enters the courtroom on either legal or municipal business." *Id.* (emphasis added).

Vasquez and *Suhre* are but two examples: In all other cases, too, the courts have held that the plaintiff has standing because of some level of regular or frequent contact with the religious display during the course of the plaintiff's routine business. *See, e.g.*, *Lefevre*, 598 F.3d at 642 (the plaintiff encounters the national motto on "coins and currency in everyday life" which "*forces him repeatedly* to encounter a religious belief he finds offensive" (emphasis added)); *Green*, 568 F.3d at 793-94 (the plaintiff visits the courthouse "on a weekly basis" for business and avocational purposes and "cannot avoid" the religious display); *O'Connor*, 416 F.3d at 1223 (the plaintiff professor and student "were *frequently* brought into direct and unwelcome contact" with a religious display "at a prominent location on campus" (emphasis added)); *Ashbrook*, 375 F.3d at 489-90 (the plaintiff "who travels to and *must* practice law within [the relevant] courtroom from time to time" and who "*has and would continue to come into direct, unwelcome contact* with the Ten Commandments display, the removal of which would, no doubt, prevent further injury to him" (emphases added)); *Glassroth*, 335 F.3d at 1292 ("The three plaintiffs are attorneys whose professional duties *require* them to enter the Judicial Building *regularly*, and when they do so they *must* pass by the monument." (emphases added)); *Saladin*, 812 F.2d at 692 (the plaintiffs "*regularly* receive correspondence on city stationery bearing the seal [that contains the word 'Christianity']" (emphasis added)); *see also Twp. of Wall*, 246 F.3d at 266 (noting that it was relevant whether the plaintiff visited a holiday display only "to describe the display for this litigation or whether, for example, he observed the display in the course of satisfying a civic obligation").

To be sure, courts have "recognized that '[t]he practices of our own community may create a larger psychological wound than someplace we are just passing through.'" *Suhre*, 131 F.3d at 1087 (alteration in original) (quoting *Washegesic*, 33 F.3d at 683). Accordingly, "where there is a personal connection between the plaintiff and the challenged display in his or her community, standing is more likely to lie." *Id.*; *see also City of Plattsmouth*, 358 F.3d at 1030 ("That the injuries are caused by [the plaintiff's] own City is all the more alienating."); *City of St. Charles*, 794 F.2d at 268 ("Maybe it ought to make a difference if . . . a plaintiff is complaining about the unlawful establishment of a religion by the city, town, or state in which he lives."). But no court has adopted a per se rule that the location of a religious display in the plaintiff's hometown or home state automatically confers standing on the plaintiff. *See Suhre*, 131 F.3d at 1087 (holding that, where the display is in the plaintiff's community, "standing is *more likely* to lie" only "where there is a *personal connection* between the plaintiff and the challenged display" (emphases added)); *Rabun Cnty.*, 698 F.2d at 1107 (holding that the location of the display in the plaintiffs' home state was one of several relevant "factors"). As in all cases, even when the religious display is in the plaintiff's hometown, the plaintiff must establish direct and unwelcome contact with the display. *See, e.g.*, *Suhre*, 131 F.3d at 1090 (determining whether the plaintiff has the requisite direct and unwelcome contact with the display, even though the display is located in the plaintiff's municipality).

Finally, the injury arises not purely from the psychological harm of viewing the display, but from the *consequence* of that harm. That is, a plaintiff's

negative reaction to a religious display on public property interferes with the plaintiff's right to " 'freely use public areas.' " *Ellis*, 990 F.2d at 1523 (quoting *Hewitt*, 940 F.2d at 1564); *accord Ouachita Parish*, 274 F.3d at 292 ("use or enjoyment of a public facility"); *City of Eugene*, 93 F.3d at 619 n.2 ("freely using the area on and around [the public park]"); *Gonzales*, 4 F.3d at 1417 ("full use and enjoyment of the public park"); *Hawley*, 773 F.2d at 740 ("impairment of their beneficial use of a public facility which they frequently use"). "We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact. Such inhibition constitutes 'personal injury suffered . . . *as a consequence* of the alleged constitutional error,' beyond simply 'the psychological consequence presumably produced by observation of conduct with which one disagrees.' " *Buono*, 371 F.3d at 547 (citations omitted) (ellipsis in original) (quoting *Valley Forge*, 454 U.S. at 485); *see also Barnes-Wallace*, 530 F.3d at 784 ("As in *Buono*, [the plaintiffs] have alleged injuries beyond 'the psychological consequence presumably produced by observation of conduct with which they disagree,' because their inhibition interferes with their personal use of the land." (brackets omitted) (quoting *Valley Forge*, 454 U.S. at 485)).

B. *Resolution No. 168-06 and Alleged Harm to Plaintiffs*

Plaintiffs challenge Resolution No. 168-06. They allege that the resolution "attacks [their] deeply held religious beliefs," "stigmatizes Plaintiffs on account of their religious beliefs," and "sends a clear message . . . that they are outsiders, not full members of the political community." Plaintiffs allege that, as

residents of San Francisco and members of the Catholic Church, the resolution "chill[s] their access to the government." "As a result of [the] resolution, Plaintiffs . . . will curtail their activities to lessen their contact with Defendants, thereby causing further harm."

In some ways, Plaintiffs' allegations evince a much stronger connection to the challenged governmental action than the plaintiffs' allegations in *Valley Forge*. The plaintiffs in *Valley Forge* had never visited, and had no other connection to, the land in question. Here, Plaintiffs reside in San Francisco, and Defendants operate as the San Francisco municipal government. There is no geographical separation. Additionally, Plaintiffs view the resolution as a direct attack on their specific religion: Catholicism. There may be some stronger connection to the challenged government action when the action is perceived as a direct attack on one's own religion, as distinct from a more general offense that the government is condoning or conveying religious messages with which one generally disagrees or to which one does not adhere. I acknowledge that Plaintiffs' residency and their perception of the government action as attacking their specific religion distinguish this case in significant ways from the Supreme Court's *Valley Forge* decision.

In other ways, however, the allegations in the complaint suggest that Plaintiffs are more akin to "concerned bystanders," *Valley Forge*, 454 U.S. at 473 (internal quotation marks omitted), who have suffered no injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees," *id.* at 485. The parties do not dispute that the resolution is entirely non-binding and

that it has no legal effect. It confers no benefits or legal rights. It imposes no obligations or responsibilities on anyone. It alters no government process, ordinance, or plan. In short, it does not *do* anything, other than to "urge" Cardinal Levada to withdraw his directive concerning Catholic Charities' adoption policies. This hortatory resolution is like precatory text in a statute's preamble, which plaintiffs lack standing to challenge unless the text applies to them "in some concrete way." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506 (1989); *see also id.* at 504-07 (discussing this issue generally).

As discussed above, Plaintiffs are not the first to challenge a governmental policy or provision.[8] And, as discussed above, the courts have developed consistent requirements for establishing standing: In order to establish standing, Plaintiffs must allege that the provision applies to them in some direct and concrete manner. Plaintiffs' allegations here do not suffice.

Plaintiffs do not, and could not, claim that they are subject to the provisions of the non-binding resolution. They do not claim to be subject to the government's

---

[8] The majority opinion incorrectly asserts that I conclude that this case does not involve a challenge to a governmental policy or provision. Maj. op. at 17369-70 n.26. To the contrary, Plaintiffs here challenge a resolution enacted by Defendants, and I agree completely with the majority that "an official resolution of the City of San Francisco is indeed a case involving a specific governmental policy." *Id.* (internal quotation marks and brackets omitted). In text, I apply, as we must, the clear standing requirements that we and other courts have developed in cases involving challenges to governmental policies. The majority opinion fails even to acknowledge those requirements or, in large degree, even the relevant cases.

action—the "urging" of Cardinal Levada to retract his earlier directive. Instead, they claim harm from the "message" that the resolution's terms "sends" to Plaintiffs. I agree with the District of Columbia Circuit that, "[w]hen plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim." *In re Navy Chaplaincy*, 534 F.3d at 764-65.

Plaintiffs here have expressed their deep and genuine offense. Their status as Catholics and San Francisco residents distinguishes their concerns, at least to some extent, from the concerns of others who may view the resolution as offensive. In the end, however, the resolution carries no legal effect and, perhaps most importantly, does not apply to Plaintiffs.

Plaintiffs effectively ask us to hold that any person has standing to challenge any governmental action on Establishment Clause grounds, so long as the plaintiff resides within the government's territory and is offended by the action's alleged attack on the plaintiff's religion. As discussed above, in Part A, a governmental action within one's own community suggests that standing is more likely to lie. But the courts have declined to apply a per se rule that those who reside within the geographic boundaries of the government automatically have standing to challenge the government's actions. Instead, the courts have required a showing that the challenged action actually affects these particular plaintiffs. Resolution No. 168-06 simply does not apply to Plaintiffs.

Nor does the fact that Plaintiffs perceive the resolution as a direct attack on their specific religion suffice to meet the "particularized" requirement.[9] In that regard, Plaintiffs' claims here are indistinguishable from the plaintiffs' claims in *Flora*, 692 F.2d at 54. There, the atheist plaintiffs, who resided in Arkansas, challenged a state constitutional provision that barred atheists from certain civic opportunities. *Id.* The Eighth Circuit held that, unless the plaintiffs could demonstrate that they had been, or would be, actually subject to the provision (which they could not), the plaintiffs lacked standing. *Id.* Citing *Valley Forge*, the court rejected the plaintiffs' theory that, "as atheists, they have suffered adverse psychological consequences as a result of the continued presence of this section in the Arkansas Constitution." *Id.* Like the Arkansas atheists in *Flora*, the San Francisco Catholics here cannot demonstrate that they are subject to the challenged provision, even though

---

[9] It is easy to overstate this distinction. A person who adheres to a religion other than, for example, Christianity may perceive the government's placement of a cross on a hill as a direct negative attack on that person's non-Christian religion, rather than as an affirmative endorsement of Christianity. Precisely for this reason, the courts have treated an endorsement and a disapproval as two sides of the same coin in the Establishment Clause context. *See, e.g.*, *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."). Similarly, an atheist might view the national motto, "In God We Trust," as an attack on his or her religious beliefs. But that fact is insufficient to confer standing. *Lefevre*, 598 F.3d at 643. I therefore decline to attribute much significance to this distinction for standing purposes.

they allege adverse psychological consequences as a result of the resolution's passage. Accordingly, Plaintiffs do not have standing.

The same analysis applies to our recent decisions involving atheist plaintiffs' challenge to the national motto, "In God We Trust," *Lefevre*, 598 F.3d at 643, and to the inclusion of the words "under God" in the national pledge of allegiance, *Rio Linda*, 597 F.3d at 1016. In those cases, the plaintiffs challenged not only the federal statute declaring our national motto and the federal statute adding the words "under God" to our pledge of allegiance, but the plaintiffs *also* challenged the statutes and policies that required that the motto be inscribed on our coins and currency and that the pledge be recited in schools. *Lefevre*, 598 F.3d at 643; *Rio Linda*, 597 F.3d at 1016. We held that the plaintiffs lacked standing to challenge the first type of statute: the federal statute declaring our national motto, *Lefevre*, 598 F.3d at 643, and the federal statute adding the words "under God" to our pledge of allegiance, *Rio Linda*, 597 F.3d at 1016. The fact that a statute on the books made the plaintiff feel like a "political outsider[ ]" and "inflict[ed] a stigmatic injury" was "insufficient to confer standing." *Lefevre*, 598 F.3d at 643; *see also Rio Linda*, 597 F.3d at 1016 (holding that, "because the Pledge does not mandate that anyone say it, [the plaintiff] has no personal injury to contest its wording in the courts" and therefore lacks standing to challenge the federal statute declaring the pledge). By contrast, we held that the plaintiff *did* have "standing to challenge the statutes that require the inscription of the motto on coins and currency . . . given the ubiquity of coins and currency in everyday life," *Lefevre*, 598 F.3d at 642, and that plaintiff parents of schoolchildren *did* have

standing to challenge the state statute and school district policy permitting teachers to lead students through recitation of the pledge of allegiance, *Rio Linda*, 597 F.3d at 1016. Those statutes had a direct effect on the plaintiffs.

Here, Plaintiffs challenge the resolution only. As in *Lefevre* and *Rio Linda*, Plaintiffs allege that the governmental action makes them feel like political outsiders and stigmatizes them because of their religious beliefs. And, as in *Lefevre* and *Rio Linda*, those allegations are insufficient. Plaintiffs' contact with the resolution here is no greater than the plaintiffs' contact with the federal statutes at issue in *Lefevre* and *Rio Linda*.

In those cases, we held, of course, that the plaintiffs had standing to challenge *other* statutes and policies—those statutes that put the plaintiffs in direct and unwelcome contact with the religious statement or religious exercise. But, in this case, there are no such other statutes or policies and no such direct and unwelcome contact. Clearly, Defendants have in no way inscribed the resolution on an item of everyday life such that Plaintiffs must encounter it, and Defendants have in no way required Plaintiffs to participate in a daily recitation of the resolution. Plaintiffs' challenge is limited to the resolution itself, which sets forth Defendants' policy statement on a matter of concern to the City—the precise parallel to the federal statutes setting forth our national motto and pledge of allegiance. Just as the plaintiffs' deep offense at the national motto and pledge of allegiance could not confer standing, neither can Plaintiffs' deep offense at Defendants' resolution confer standing here.

In conclusion, Plaintiffs' allegations are, in all relevant respects, identical to the plaintiffs' allegations in our recent decisions in *Rio Linda* and *Lefevre* and to the plaintiffs' allegations in *Flora*. Just as the allegations in those cases were insufficient to confer standing, so too are Plaintiffs' allegations here.

The majority fails to grapple with our holdings in *Rio Linda* and *Lefevre*. In particular, our holding in *Lefevre*, 598 F.3d at 643, applies with equal force here: "Although [Plaintiffs] allege[ ] the [resolution] turns [Catholics] into political outsiders and inflicts a stigmatic injury upon them, an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing." The majority distinguishes those cases, and all other precedent, only on the ground that this case involves an *unambiguous* condemnation of a specific religion, while previous ones involved "vague and general religiosity." Maj. op. at 17370 n.26. As an initial matter, despite the great number of previous decisions involving challenged governmental actions, the majority cites not a single one in which the ambiguity or plainness of the perceived condemnation or endorsement of religion is even mentioned by a reviewing court for purposes of the standing inquiry. I do not, of course, question that Plaintiffs view the resolution as an attack on their religion. Similarly, though, courts in previous cases have not questioned that the plaintiffs viewed the challenged governmental action as an attack on, or an endorsement of, a specific religion. Whether the members of the reviewing court perceive the alleged attack or endorsement as "plain" or "ambiguous" seems fraught with difficulty. And, in many of the cases I have cited, I see no ambiguity. For example, the statute declaring our motto as "In God We Trust" is an

unambiguous endorsement of theistic religions at the expense of the beliefs of atheists. Similarly, the placement of a cross on a city's seal is an unambiguous endorsement of Christianity at the expense of non-Christian religions. Yet, in *Lefevre* and *Vasquez*, and in all our other previous cases, the ambiguity or plainness of the challenged governmental action played no part in the analysis of standing.

Plaintiffs next argue, by way of analogy, that the resolution is similar to a religious display. They contend that, because they have been exposed to the "display," they have alleged sufficient "contact" with the "display" to constitute an injury in fact. The complaint does not allege the manner in which Plaintiffs encountered the resolution or the form of "display" to which Plaintiffs object, but it appears that Plaintiffs mean that they have read the resolution. That fact does not confer standing.

To begin with, the resolution is *not* a display; it is an act (albeit a non-binding act) of a legislative body. Had Defendants reproduced the resolution, for example, in giant letters above the entrance to City Hall, *Cnty. of Montgomery*, 41 F.3d at 1158, or chiseled the resolution into a block of stone eight feet tall and three feet wide in a public park, *Green*, 568 F.3d at 789-90, the resolution's representation *in those forms* would constitute a religious display. As it is, though, the complaint fails to allege that this resolution has received greater prominence than any other. The resolution was posted, like every other resolution, on Defendants' website. *See* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions06/r0168-06.pdf.

The mere existence of an enactment on the books (or virtual books) is not enough. In the religious display context, a plaintiff has standing when he or she encounters the display with some level of frequency or regularity during the course of the plaintiff's typical routine. It is that "direct and unwelcome contact" with the display that confers standing on the plaintiff. Here, Plaintiffs read the resolution. But apart from that initial contact, Plaintiffs allege no facts to suggest that they ever would have reason to read the resolution again, as part of their regular routine or otherwise (except to facilitate this litigation). In summary, even if I construed the resolution as a religious display, which it is not, Plaintiffs could not meet the "direct and unwelcome contact" requirement that courts consistently have applied in religious display cases.

In this regard, our recent decision in *Caldwell*, 545 F.3d 1126, is instructive. There, the plaintiff objected to a webpage on a government website. *Id.* at 1128. The plaintiff argued that,

> like the plaintiffs in [religious display] cases, she also came into direct contact with a religious symbol on property owned by the government which she finds offensive; and that, just as the inability of plaintiffs in those cases freely to use public land sufficed as injury in fact, so too should it suffice that she is inhibited from freely using a government resource without running into religious symbols and theological statements which offend her.

Id. at 1131. We rejected her argument, because her interest in using the website was no different than

anyone else's: Her interest was "not sufficiently differentiated and direct to confer standing on her . . . . An interest in informed participation in public discourse is one we hold in common as citizens in a democracy." *Id.* at 1133. Judge Fletcher wrote separately "to elaborate more fully why Caldwell lacks standing." *Id.* (B. Fletcher, J., concurring). Judge Fletcher held that the plaintiff could not establish an injury in fact because:

> Caldwell also does not allege that her contact with the offensive views expressed on the [government] website was "frequent and regular" or "unwelcome." [*Vasquez*, 487 F.3d at 1251-52]. There is no allegation that Caldwell had any reason to visit the offending web page more than once. Nor did the single offending web page prevent Caldwell from freely using the rest of the [Understanding Evolution] website: the site comprises approximately 840 pages, each of which can be viewed without having first viewed the offending page.

Id. at 1134 (one citation omitted).

The same reasoning—of both the opinion and the concurrence—applies here. Plaintiffs' interest in reading the resolutions of their municipal government is no different than anyone else's interest and, therefore, "is not sufficiently differentiated and direct to confer standing." *Id.* at 1133. Additionally, Plaintiffs here do not allege that their contact with the resolution was anything more than a one-time occurrence, and "[t]here is no allegation that [Plaintiffs] had any reason to visit the offending web page more than once." *Id.* at 1134 (B. Fletcher, J.,

concurring). In sum, Plaintiffs' allegations do not constitute an injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. Plaintiffs therefore lack standing.

Plaintiffs next protest that their allegations constitute more than pure psychological harm, because they also allege that Defendants' abuse of power has "chill[ed] their access to the government. As a result of [the] resolution, Plaintiffs . . . will curtail their activities to lessen their contact with Defendants, thereby causing further harm." Plaintiffs refer us to cases in which courts have held that plaintiffs have standing because of an affirmative change in behavior to avoid a particular religious display. *See, e.g.*, *Ellis*, 990 F.2d at 1523 (holding that the plaintiffs have standing because they allege that they avoid a public park where a cross is located). Plaintiffs argue that, like the plaintiffs in those cases who avoided public lands to avoid a religious display, Plaintiffs here have standing because their access to government has been "chill[ed]" and they "will curtail their activities to lessen their contact with Defendants." I am unpersuaded.

Plaintiffs' allegations suffer from lack of specificity. It is unclear, for instance, when Plaintiffs "will" curtail their activities. It also is unclear what contacts Plaintiffs maintain with Defendants and how, if at all, they "will curtail their activities to lessen [that] contact." These vague allegations are a far cry from the allegations sufficient to confer standing in religious display cases, in which the plaintiff alleges that he or she regularly sees the offending display and explains how his or her normal routine has changed so as to

avoid those encounters. *See, e.g.*, *City of St. Charles*, 794 F.2d at 269 (holding that one plaintiff has standing because "she detours from her accustomed route to avoid the [lighted] cross"); *see also Mann v. City of Tucson*, 782 F.2d 790, 793 (9th Cir. 1986) (per curiam) ("Although we must, in general, accept the facts alleged in the complaint as true, wholly vague and conclusory allegations are not sufficient to withstand a motion to dis miss."); *Vasquez*, 487 F.3d at 1249 n.4 (noting that the district court disregarded an allegation that the plaintiff had "altered his behavior," but declining to decide the issue because other allegations sufficed to confer standing (brackets omitted)). Moreover, if Plaintiffs' vague allegations of some unspecified avoidance of governmental entities were sufficient to confer standing to challenge a proclamation of that governmental entity, then any plaintiff residing within the boundaries of the governmental body could satisfy the "injury in fact" requirement simply by alleging, in general, a threatened curtailment of activities with the governmental entity. No court has accepted such a sweeping proposition. *Cf. Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." (internal quotation marks omitted)).

Plaintiffs also point to the primary reason for the standing doctrine: " 'The essence of the standing inquiry is whether the [plaintiffs] have alleged such a personal stake in the outcome of the controversy *as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely*

depends for illumination of difficult constitutional questions.' " *Larson*, 456 U.S. at 238-39 (emphasis added) (quoting *Duke Power*, 438 U.S. at 72). Plaintiffs contend that their deep opposition to the resolution is patent and genuine and that their determined adverseness to the resolution satisfies the basic purpose of the standing doctrine: They are fervent advocates who provide a sharp presentation of the issues.

I do not question the commitment of Plaintiffs to this case or the skill with which they have presented, and undoubtedly would continue to present, the issues. But the Supreme Court expressly has rejected passion as a substitute for Article III standing. "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy. '[T]hat concrete adverseness which sharpens the presentation of issues,' *Baker v. Carr*, 369 U.S. [186,] 204 [1962], is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself." *Valley Forge*, 454 U.S. at 486; *see also Smelt*, 447 F.3d at 685 ("Motivation alone is not enough [to satisfy standing requirements].").

Plaintiffs also suggest that they must have standing to challenge the resolution because, if they do not have standing, no one would have standing, and that result cannot be correct. I disagree with Plaintiffs' major premise and their minor premise. It is a bedrock principle that the federal courts are courts of limited jurisdiction. A wide variety of doctrines, including standing, prevent us from hearing cases—even otherwise meritorious cases—because of the constitutional limits on our authority. As a general

matter, I simply cannot accept an argument that begins with the premise that the federal courts *must* have jurisdiction over a dispute. More specifically, the Supreme Court has roundly rejected Plaintiffs' argument in this very context: " 'The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.' " *Valley Forge*, 454 U.S. at 489 (alteration omitted) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

Perhaps most importantly, however, Plaintiffs are wrong to suggest that, if they lack standing, then it is clear that no one would have standing to challenge the resolution at issue. To the contrary, it is likely that the parties who are personally the subjects of the resolution, such as Cardinal Levada, Archbishop Niederauer, and Catholic Charities, could demonstrate cognizable harm. The record is silent as to why those parties have not joined as plaintiffs. But their interests, which likely *are* directly affected, matter. "The Art. III aspect of standing . . . reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge*, 454 U.S. at 473; *see also id.* at 489-90 (holding that the Court was "unwilling to countenance" a theory whereby "[t]he existence of injured parties who might not wish to bring suit becomes irrelevant"). For Plaintiffs, however, the resolution carries no legal or direct, particularized, concrete, or practical effect. Accordingly, Plaintiffs cannot establish "injury in fact."[10]

---

[10] Although we need not reach the issue, we note in addition that Plaintiffs almost certainly cannot satisfy the "redressability"

Plaintiffs lack standing because no individual Plaintiff can establish "injury in fact." For that reason and because the complaint fails to allege that any party directly targeted by the resolution is a member of Catholic League, Catholic League likewise lacks associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (holding that, to establish associational standing, an organization must, among other things, demonstrate that its members would otherwise have standing to sue in their own right).

---

requirement. *Lujan*, 504 U.S. at 560-61. The resolution exists; it is on the books; and it is an expression of the policy preferences of San Francisco. This court is powerless to change the opinion of the Board of Supervisors on the subject of same-sex adoptions. Even if we declared the resolution unconstitutional, the only real effect of that declaration on Plaintiffs would be to make Plaintiffs happy. Just as the negative psychological consequence of the government's action is insufficient to satisfy the "injury in fact" requirement, the positive psychological consequence of the court's action is likewise insufficient to satisfy the "redressability" requirement. Hints of this aspect of redressability are found within the case law. *See, e.g.*, *Ashbrook*, 375 F.3d at 489-90 (holding that the plaintiff "has and would continue to come into direct, unwelcome contact with the [religious] display, the removal of which would, no doubt, prevent further injury to him"); *Glassroth*, 335 F.3d at 1292-93 ("[A] favorable decision will likely redress [the plaintiffs'] injuries. If [the defendant] is required to remove the [religious display] from the public area of the Judicial Building, the plaintiffs will no longer have to observe it or take actions to avoid going into the building."); *Ouachita Parish*, 274 F.3d at 293 ("[I]t is certain that a finding of unconstitutionality would redress the plaintiffs' injury, as it would . . . end[ ] the practice of verbal prayer in their schools."); *see also Doremus*, 342 U.S. at 433 (holding that the plaintiffs could not maintain suit because the student had graduated from the public school and "no decision we could render now would protect any rights she may once have had").

C. Municipal Taxpayer Standing

Plaintiffs also allege that they are municipal taxpayers of San Francisco and that they "have been injured by the abuse of government authority and the misuse of the instruments of government to criticize, demean, and attack their religion and religious beliefs."[11] Plaintiffs do not allege any specific expenditure of public funds, and none is apparent from the record. That being so, Plaintiffs cannot establish taxpayer standing. *See Doremus*, 342 U.S. at 433 (holding that municipal taxpayers do not have standing because "[t]here is no allegation that this [government-sponsored] activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school"); *id.* at 434 ("It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference."); *Barnes-Wallace*, 530 F.3d at 786 (holding that "municipal taxpayers must show an expenditure of public funds to have standing" (citing *Madison*, 177 F.3d at 793-97)).

---

[11] Although Plaintiffs have never argued that they have standing as municipal taxpayers, we must consider our jurisdiction independently of a party's arguments. Because they allege in the complaint that they are taxpayers of San Francisco, I address municipal taxpayer standing.

CONCLUSION

I recognize that the failure to reach an important, disputed constitutional issue leaves something to be desired. But I cannot ignore the constitutional bounds of our jurisdiction: "Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party [or, as the case may be, both parties] desires to have adjudicated . . . ." *Valley Forge*, 454 U.S. at 476. We lack subject matter jurisdiction. I therefore concur in the judgment affirming the district court's order dismissing the complaint.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-17328
D.C. No. CV-06-02351-MHP

[Filed November, 5, 2009]

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS; RICHARD SONNENSHEIN; VALERIE MEEHAN,	)
Plaintiffs - Appellants,	)
v.	)
CITY AND COUNTY OF SAN FRANCISCO; AARON PESKIN; TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors, City and County of San Francisco,	)
Defendants - Appellees.	)

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX C

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-17328
D.C. No. CV-06-02351-MHP

[Filed June 3, 2009]

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS; RICHARD SONNENSHEIN; VALERIE MEEHAN, *Plaintiffs-Appellants,*	)
v.	)
CITY AND COUNTY OF SAN FRANCISCO; AARON PESKIN; TOM AMMIANO in his official capacity as a Supervisor, Board of Supervisors, City and County of San Francisco, *Defendants-Appellees.*	)

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
July 18, 2008—San Francisco, California

Filed June 3, 2009

Before: Procter Hug, Jr., Richard A. Paez, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Paez;
Concurrence by Judge Berzon

COUNSEL

Robert J. Muise, Thomas More Law Center, Ann Arbor, Michigan, for the appellants.

Vince Chhabria, City Attorney's Office of San Francisco, San Francisco, California, for the appellees.

OPINION

PAEZ, Circuit Judge:

Appellants, Catholic League for Religious and Civil Rights, Dr. Richard Sonnenshein, and Valerie Meehan (collectively, "Catholic League" or "the League"), appeal the dismissal of their civil rights action under 42 U.S.C. § 1983 for failure to state a claim. At issue is the constitutionality of a non-binding resolution adopted by the Board of Supervisors of the City and County of San Francisco ("the Board") concerning the adoption of children by same-sex couples and the Catholic Church's position against such adoptions. Catholic League argues that in adopting the resolution the Board expressed disapproval of the Catholic

religion in violation of the First Amendment's Establishment Clause. Because we conclude that the resolution passes constitutional scrutiny, we affirm.[1]

I.

In March, 2006, the Board passed a non-binding resolution, Res. No. 168-06, titled: "Resolution urging Cardinal Levada to withdraw his directive to Catholic Charities forbidding the placement of children in need of adoption with same-sex couples." ("Resolution"). The Resolution provides in full:

> **Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.**
>
> WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and
>
> WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should

---

[1] We have jurisdiction under 28 U.S.C. § 1291.

not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San

> Francisco stop placing children in need of adoption with homosexual households.

The Board passed this resolution in response to a then recent directive from Prefect Cardinal William Levada, instructing the Archdiocese of San Francisco that Catholic social services agencies should not place children in need of adoption with gay or lesbian couples.[2] Cardinal Levada is the head of the Congregation for the Doctrine of the Faith—an official body within the Catholic Church that, according to the complaint, is charged with "promot[ing] and safeguard[ing] the doctrine on the faith and morals throughout the Catholic world." The Resolution also quotes a statement in a 2003 document issued by the Congregation, titled "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons" ("Considerations document"). The Resolution does not name or specifically refer to the Considerations document, but the League alleges that the language "Allowing children to be adopted by persons living in [homosexual] unions would actually mean doing violence to these children" is taken from the 2003 document.

Shortly after the Board adopted the Resolution, Catholic League filed a 42 U.S.C. § 1983 suit in the Northern District of California, alleging that the Resolution violates the Establishment Clause by expressing disapproval of and hostility towards the Catholic Church and Catholic religious tenets. Catholic

---

[2] Cardinal Levada's communique is not part of the record in this case.

League sought "nominal damages, a declaration that this anti-Catholic resolution is unconstitutional, and a permanent injunction enjoining this and other official resolutions, pronouncements, or declarations against Catholics and their religious beliefs."

The Defendants-Appellees[3] filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, which the district court granted in a thorough and well-reasoned decision. Applying the three-part *Lemon* test, the district court determined that the Resolution did not have a purpose secondary to a predominant religious purpose nor a primary effect of expressing hostility towards the Catholic religion and that the resolution did not foster excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Catholic League v. City and County of San Francisco*, 464 F. Supp. 2d 938 (N.D. Cal. 2006). As a result, the court concluded that Catholic League failed to state a claim under § 1983 for violation of the Establishment Clause and dismissed the complaint. Catholic League timely appealed.

II.

We review de novo a dismissal for failure to state a claim under Rule 12(b)(6). *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). In addressing cases in this posture, we must accept the allegations in the complaint as true, and draw all

---

[3] The Defendants-Appellees include the City and County of San Francisco; Aaron Peskin, in his official capacity as President, Board of Supervisors, City and County of San Francisco; and Tom Ammiano, in his official capacity as a Supervisor, Board of Supervisors, City and County of San Francisco.

reasonable inferences in favor of the plaintiff. However, " 'conclusory allegations of law and unwarranted inferences' will not defeat an otherwise proper motion to dismiss." *Id.* (quoting *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 820 (9th Cir. 2002)).

III.

[1] "[T]he 'First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion.' " *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). This constitutional mandate requires careful and nuanced consideration in a society like ours where religion has long played a pervasive social role; government conduct towards religion "must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

[2] We apply the three-part *Lemon* test to determine whether government conduct—either through endorsement of religion or hostility towards it—violates the Establishment Clause. Government action will pass muster if it "(1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement with religion." *Vasquez*, 487 F.3d at 1255 (citing *Lemon*, 403 U.S. at 612-13). Failure to satisfy any of these three inquiries condemns government conduct as unconstitutional.

[3] Although the courts have not often had occasion to determine whether government action effects a *disapproval* of religion, as opposed to an endorsement, the Establishment Clause's neutrality mandate applies here with equal force. We are guided in our analysis by *American Family Association*, one of only a handful of disapproval cases, which dealt with another set of resolutions adopted by the San Francisco Board of Supervisors. *American Family Association* treated disapproval and endorsement as flip-sides of the same coin—the same legal tests and underlying First Amendment values apply. We phrased the applicable principle in several ways—the state may not disapprove of religion, express hostility towards religion, nor inhibit religion, *American Family Ass'n*, 277 F.3d at 1121, 1122[4]—and used the three terms interchangeably.

A.

The first step in the *Lemon* analysis is to discern the government's actual purpose in taking the challenged action—in this case, adopting the Resolution. A "predominantly religious purpose" violates the Establishment Clause. *McCreary County*, 545 U.S. at 881. Government action, however, satisfies the purpose prong if it is "grounded in a secular purpose." *Vasquez*, 487 F.3d at 1255. Furthermore, "[a] legislature's stated reasons will generally get

---

[4] The disapproval language appears to come from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), a Free Exercise Clause case; the inhibit language is drawn from *Lemon*, *see Lemon*, 403 U.S. at 612, and its predecessors, including *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 222 (1963).

deference, [but] the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County*, 545 U.S. at 864.

Catholic League argues that it is evident from the face of the Resolution that the City's predominant purpose was to attack Catholic religious beliefs. The League points to the resolution's harsh and forceful language as betraying the Board's true intentions: "discriminatory," "defamatory," "absolutely unacceptable," "hateful and discriminatory," "insulting and callous," and "show[ing] a level of insensitivity and ignorance which has seldom been encountered." The Board counters that, despite the inflammatory language, it passed the resolution for secular purposes.[5]

[4] As we explained in *American Family Association*, we do not question whether the Board's

---

[5] Our earlier cases held that even one secular purpose out of several was sufficient. That is, government action failed "the purpose prong 'only if it [was] motivated *wholly* by an impermissible purpose.' " *American Family Ass'n v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002) (quoting *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993). *But see Vernon v. City of Los Angeles*, 27 F.3d 1385, 1397 (9th Cir. 1994) ("[W]e believe that the Supreme Court has articulated a slightly more stringent test, which requires that the 'actual' or 'primary' purpose of the government action be secular."). *McCreary County* clarifies, however, that the inquiry is whether the government acted with a "predominantly" religious purpose. *See McCreary County*, 545 U.S. at 862 ("predominantly religious purpose"); *id.* at 863 ("predominant purpose of advancing religion"); *id.* at 881 ("predominantly religious purpose"); *id.* at 864 (secular purpose cannot be "merely secondary to a religious objective").

actions were wise; "rather we determine the constitutionality of those actions." *American Family Ass'n*, 277 F.3d at 1122. *See also Brown v. Woodland Joint Unified School District*, 27 F.3d 1373, 1382 (9th Cir. 1994) ("[O]nce the state is free to use a secular means of attaining a goal, it is not required to use an alternative secular means that is less likely to be associated with religion."). To be sure, the Board could have spoken with a gentler tone, but the strength of the Board's language alone does not transform a secular purpose into a religious one. The constitutional question remains whether the Board's purpose in adopting the Resolution was secular in nature. In other words, we must first decide whether the Board's purpose in criticizing the Cardinal's directive was disapproval of religious doctrine, or a call for non-discrimination in the adoption of children, and second whether for Establishment Clause purposes there is a difference between the two.[6]

"The eyes that look to purpose belong to an 'objective observer.' " *McCreary County*, 545 U.S. at 862 (quoting *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The objective observer is "one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Id.* at 866. In so describing the objective observer, the Supreme Court has instructed that we cannot "cut the context" out of the purpose inquiry. *Id.* at 864. Examining the Board's resolution in context, the district court correctly concluded that the objective observer would ascertain a secular

---

[6] We revisit the Resolution's tone in the effects analysis, where the choice of language may have a different impact.

purpose behind the Board's adoption of the non-binding Resolution.[7]

[5] The Board argues that its predominant purpose in adopting the Resolution was to "denounce discrimination against same-sex couples, and to try to preserve for San Francisco children the opportunity to be placed for adoption with qualified families without regard to sexual orientation." That purpose is set out by both the title and preamble of the Resolution. Indeed, the title states: "Resolution urging Cardinal Levada to withdraw his directive to Catholic Charities

---

[7] Although the purpose test has always called on us to discern the government's actual purpose, *see American Family Ass'n*, 277 F.3d at 1121; *Kreisner*, 1 F.3d at 782, *McCreary County* recently sharpened the inquiry. The Court announced that purpose must be evaluated from the perspective of an objective observer. The Second Circuit has suggested that after *McCreary County* the courts must now engage in two distinct inquires—one to assess the government's "actual" purpose, and another to ask how "the government's purpose is perceived by an objective observer." *Skoros v. City of New York*, 437 F.3d 1, 22 (2d Cir. 2006) (internal quotations omitted). We do not read *McCreary County* as adopting a two part inquiry for evaluating government purpose. By adopting an objective test, the Court dismissed the petitioners' assertion that "true 'purpose' is unknowable, and its search [is] merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent." *McCreary County*, 545 U.S. at 861. As the Court explained, the purpose inquiry is not an invitation to courts to cherry pick; instead, "scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862. Toward that end the Court noted that "[t]he eyes that look to purpose belong to an 'objective observer.'" *Id.* In other words, we use the objective observer—one who takes account of history and context—to discern the government's "actual" purpose.

forbidding the placement of children in need of adoption with same-sex couples." And to emphasize, the preamble declares: "Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households." This theme is born out in the opening paragraph, which places the Resolution in the context of San Francisco's "existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need," and continues throughout the text, which explains that "[s]ame-sex couples are just as qualified to be parents as are heterosexual couples." It is apparent that the Resolution is about non-discrimination in adoption.

In addition, the timing of the Resolution lends further context and supports the Board's asserted purpose. *See McCreary County*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315) ("[R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.' " (quoting *Santa Fe*, 530 U.S. at 315)). The Congregation for the Doctrine of the Faith issued its clarion call against legalization of gay and lesbian unions, as an exposition of religious belief, in 2003. It was not until March 2006, days after Cardinal Levada directed Catholic Charities, a social services agency in the City of San Francisco, to stop placing children for adoption with gay and lesbians couples, that the Board adopted this resolution. Keeping in mind the context in which the Resolution arose, the objective observer would

conclude that the Board's purpose in adopting the Resolution was to respond to a public action that would affect both its gay and lesbian constituents, as well as the children in the City and County's jurisdiction. The Board's focus was on same-sex couples, not Catholics.

[6] Moreover, "[a] reviewing court must be 'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Kreisner*, 1 F.3d at 782 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)). In light of this proscription, and the Resolution's focus on and stated goal of protecting and promoting adoption by same-sex couples, an objective observer would conclude that the Board's purpose was to champion needy children, gays, lesbians, and same-sex couples within its jurisdiction; not to officially disapprove of the Catholic faith or its religious tenets.

Catholic League maintains, however, that this is a distinction without a difference. It argues that the Board's support for same-sex adoption, and its basic underlying assumption that same-sex couples should be treated no differently than heterosexual couples—and that anything less is discriminatory, defamatory, and hateful—expresses hostility toward their *religious* beliefs that homosexuality is "deviant," and "intrinsically disordered," homosexual acts are "acts of grave depravity," homosexual unions are "clearly . . . immoral," and "[a]llowing children to be adopted by persons living in such unions would actually mean doing violence to these children."

As the district court noted, same-sex adoption is "a secular dimension of the City's culture and tradition

that the City believes is threatened by the specific directive issued to the Archdiocese." *Catholic League*, 464 F. Supp. 2d at 944. The Board considers its Resolution as a secular message promoting same-sex adoption—a message that is in accord with a bevy of California and San Francisco laws and policies that promote equal rights for gays and lesbians and their families, *see In re Marriage Cases*, 43 Cal. 4th 757 (2008) (documenting the City and County of San Francisco's involvement as a plaintiff in the litigation to legalize same-sex marriage); *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055 (2004) (holding that City and County officials lacked the authority to issue marriage licenses to same-sex couples, a practice they adopted at the Mayor's direction); SF Admin. Code § 62.1 (officially recognizing domestic partnerships); SF Admin. Code § 12B1 (preventing entities that contract with the City from discriminating on the basis of sexual orientation, domestic partner status, or marital status), and resolutions that denounce discrimination against gays and lesbians from all sources, *see infra* pp.6599-6600 (listing San Francisco Board of Supervisors non-binding resolutions). To put it plainly, what the Board considers secular, Catholic League considers hostile to Catholic religious tenets.

[7] This dual characterization is not uncommon. Courts have long recognized that certain secular beliefs, views, and positions coincide with religious beliefs, views, and positions. In such cases, government speech or action with respect to a secular issue is not considered endorsement of religion simply because the government's views are consistent with religious tenets. That is, the same belief can have both religious and secular dimensions; the government is

not stripped of its secular purpose simply because the same concept can be construed as religious. *See McGowan v. Maryland*, 366 U.S. 420, 442 (1961) ("[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation .... [T]he fact that [a policy] agrees with the dictates of the Judaeo Christian religions while it may disagree with others does not invalidate the regulation."); *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988) ("On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive Adolescent Family Life Act funding will agree with the message that Congress intended to deliver . . . is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion."); *id.* at 605 (noting that "promot[ing] adoption as an alternative [for adolescent parents]" is an approach that is not "inherently religious, although it may coincide with the approach taken by certain religions."); *Brown*, 27 F.3d at 1381 (" '[M]ere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion.' " (quoting *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 827 F.2d 684, 692 (11th Cir. 1987))).[8] In sum, if

---

[8] *See also Okwedy v. Molinari*, 150 F. Supp. 2d 508, 519-20 (E.D.N.Y. 2001) (rev'd in part *Okwedy v. Molinari*, 333 F.3d 339

consistency with religious beliefs is not endorsement of religion, inconsistency is not hostility to it.

Our opinion in *American Family Association* is particularly instructive. In 1998, several religious groups sponsored a multimedia advertising campaign titled "Truth in Love." *American Family Ass'n*, 277 F.3d at 1118. The advertisement, printed in the San Francisco Chronicle, stated that "God abhors any form of sexual sin," including homosexuality, and claimed that Jesus Christ could help gays and lesbians "walk[] out of homosexuality into sexual celibacy." *Id.* at 1119. The ad also included "statistics" about homosexuality, sexually transmitted infections, and "destructive behavior." *Id.*

In response to the ad campaign, the San Francisco Board of Supervisors sent a letter to the plaintiffs (among other campaign sponsors), stating that "Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people," and that "there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious

---

(2d Cir. 2003)) ("Government dissemination of a message of tolerance of diverse views 'is an entirely appropriate secular effect,' and its mere consistency or inconsistency with the religious tenets of certain faiths is insufficient to constitute an unconstitutional establishment of religion. . . . In criticizing a public message of intolerance of homosexuality, Molinari did not violate the Establishment Clause." (quoting *Smith*, 877 F.2d at 692)); *Gheta v. Nassau Co. Comm. College*, 33 F. Supp. 2d 179, 186 (E.D.N.Y. 1999) ("[I]t is not unconstitutional to criticize principles that happen to coincide with the religious teachings of certain groups.").

organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians," such as the brutal murder of Matthew Shepard. *Id.* The Board then adopted two resolutions—one urging Alabama legislators to include sexual orientation in their hate crimes legislation, and calling on the "Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians," *id.*; the other addressing the advertisements. The second resolution called the ad's statistical assertions "erroneous and full of lies," and stated that the campaign encouraged maltreatment of and violence against gays and lesbians. *Id.* at 1120.

[8] The plaintiffs, religious organizations, filed a § 1983 action against the Board, claiming that the letter and resolutions violated the Establishment Clause by disapproving of a "particular religion." *Id.* On appeal we concluded that the defendants' actions had a plausible secular purpose and the primary effect of the documents in question was "encouraging equal rights for gays and discouraging hate crimes," *id.* at 1121-23, not hostility "towards the *religious* view that homosexuality is sinful or immoral," *id.* at 1122 (emphasis added). We recognized the dual nature of views on homosexuality, and determined that San Francisco should not be hamstrung in its public policy simply because its secular position was at odds with certain religious views; that some perspectives on gay and lesbian issues are rooted in religious belief cannot overwhelm the fact that gay and lesbian issues are also secular policy matters. Any other approach would stymie government's ability to take action on all "potentially religious issues, including abortion, alcohol use, [and] other sexual issues." *Id.* at 1123.

That is simply not the purpose or function of the Establishment Clause. The government must maintain neutrality among religions and between religion and nonreligion, but it cannot be held hostage to it. It is well within the Board's secular purview to promote adoptions of children by same-sex couples and denounce discrimination for the "general welfare of society." *McGowan*, 366 U.S. at 442.

B.

[9] Although the Board's purpose was secular, the resolution may still violate the Establishment Clause if it "has the principal or primary effect of advancing or inhibiting religion." *American Family Ass'n*, 277 F.3d at 1122. To ascertain effect, we ask whether "it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1398 (9th Cir. 1994). This inquiry is conducted "from the perspective of a 'reasonable observer' who is both informed and reasonable," *American Family Ass'n*, 277 F.3d at 1122 (quoting *Kreisner*, 1 F.3d at 784), and who is "familiar with the history of the government practice at issue." *Kreisner*, 1 F.3d at 784.[9]

---

[9] We previously encountered this observer in our purpose inquiry. Post-*McCreary County* we turn to the objective observer to assess both purpose and effect. The question arises whether these inquiries have substantially merged. In both instances, the objective observer takes context and history into consideration, ensuring that he addresses both questions from the same nuanced, contextualized perspective. Two differences remain, however. First, whereas in the purpose inquiry, we are " 'reluctant to attribute unconstitutional motives' to government actors in the

[10] As discussed above, the Board's unequivocal promotion of non-discrimination against same-sex couples in adoption is secular, regardless of whether the Catholic Church may be opposed to it as a religious tenet. The question is whether promotion of same-sex adoption is reasonably understood as the *primary* message conveyed by the Resolution.[10] It is not enough that one might " 'infer' " disapproval of Catholic religious tenets; rather, disapproval or inhibition must " 'objectively be construed as the primary focus or effect.' " *American Family Ass'n*, 277 F.3d at 1122 (quoting *Vernon*, 27 F.3d at 1398-99).[11]

---

face of a plausible secular purpose." *Kreisner*, 1 F.3d at 782 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)), no such presumption applies in the effects analysis. Moreover, the objective observer must be presumed to understand the difference between what the government intends and what it produces. The purpose prong asks what message the government *meant* to convey, while the effects prong asks what message the government *actually* conveyed. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). Given the salience of San Francisco's history of gay and lesbian advocacy to each inquiry, the two questions are closely related here.

[10] As an initial matter, we note that it is not immediately obvious that a non-binding resolution has any "effects." By definition, it imposes no regulation or obligation. Establishment Clause cases, however, regularly turn on symbolism. Just as a holiday display can convey a message, so too a non-binding resolution.

[11] Catholic League argues that if the Resolution conveys *any* message of hostility towards the Catholic religion—be it secondary, tertiary, or otherwise—the Resolution fails the *Lemon* test, and the district court erred as a matter of law in concluding that the Board's *primary* purpose is dispositive. Catholic League's argument is unavailing. Our precedents make clear that we treat inhibition no differently than advancement; we are tasked with determining whether the *primary* effect of the challenged

[11] The primary message conveyed by the Resolution turns in large part on the scope of the lens through which we view it. We believe that a sufficiently broad lens is essential. We must read the Resolution "as a whole," *American Family Ass'n*, 277 F.3d at 1122; its message can be affected by its context and must be analyzed given its "unique circumstances." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). To be sure, there are statements in the Resolution that, taken in isolation, may be said to convey disparagement towards the Catholic Church. But to be violative of the Establishment Clause, those statements must overwhelm the Resolution's secular dimensions. Considering the Resolution as a whole, with its focus on the City's tradition of promoting and defending same-sex relationships, they do not.

[12] Again, Catholic League argues that the Board's harsh language conveys a message of disapproval. As we explained above, generally, the Resolution's strong language speaks to its secular message: "denounc[ing] discrimination against same-sex couples" and supporting adoption by such couples of children in need. The Resolution, however, also targets the statement, attributed to Cardinal Levada and the Vatican that "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children," and calls it, among other things "absolutely unacceptable to the citizenry

---

government action endorses or disapproves of religion or a religion. *See, e.g.*, *American Family Ass'n*, 277 F.3d at 1122 ("[T]he focus of this prong is on the *primary* effect of the government's conduct.") (emphasis in original); *Vernon*, 27 F.3d at 1398 ("[T]he key consideration in this second prong analysis is whether the government action 'primarily' disapproves of religious beliefs.").

of San Francisco." That statement comes from the Considerations document, which the complaint explains is an exposition of Catholic religious tenets. Standing alone, therefore, an objective observer might conclude that the Board was expressing disapproval of Catholic religious belief, rather than endorsing a secular position. But the statement does not stand alone. It is embedded in the larger Resolution which is primarily a defense of same-sex adoption. That one statement cannot fairly be said to embody the Resolution's primary message.

[13] The Resolution also urges "Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada," and urges "Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive." Catholic League argues that those statements express disapproval of religion/ Catholicism, and that they are not incidental to the primary message, but rather they define the message. We agree with the district court's observation that "[t]he fact that the City was commenting on the policy of the Archdiocese in this regard does not violate the Establishment Clause simply because the secular activity [i.e. adoption] was being performed by a religious organization." *Catholic League*, 464 F. Supp. 2d at 945 (citing *Bowen*, 487 U.S. at 613).[12] In any

---

[12] To be clear, we do not distinguish between religious beliefs and implementation of those beliefs. The directive, as far as the Catholic Church is concerned, may very well be just as "religious"

event, however, given the Resolution's primary message of promoting same-sex adoption, any hostility conveyed towards particular Catholic tenets by those statements was secondary at best.

The Board's extensive and persistent practice of passing non-binding resolutions denouncing discrimination against gays and lesbians also shapes the message the Resolution conveys. The Board's secular defense of same-sex couples in all aspects of life is the dominant theme of the Board's actions. *See* Resolution No. 73-05[13] ("Resolution urging the Supreme Court of the United States to rescind their refusal and to accept the hearing of a legal challenge to Florida's prohibition of adoption of children by gays and lesbians"); Resolution No. 129-06 ("Resolution urging the IRS to reconsider their ruling on Domestic Partners and Community Property"); Resolution No. 166-06 ("Resolution urging Governor Schwarzenegger to submit amicus brief to New York Supreme Court of Appeals in support of the right of same-sex civil marriage"); Resolution No. 364-06 ("Resolution condemning the government sanctioned violence and chaos which took place during Moscow's first Gay Pride march"); Resolution No. 127-05 ("Resolution

---

as statements of belief in the Considerations document. The Board's statements with respect to the directive may nonetheless be secular and convey a message of non-discrimination in adoption.

[13] The district court took judicial notice of these resolutions as matters of public record, *see Catholic League*, 464 F. Supp. 2d at 941, as do we. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("[A] court may take judicial notice of matters of public record" (internal quotation omitted)).

urging . . . Secretary of Education to publicly apologize to gay, lesbian, bisexual, and transgender community"); Resolution No. 454-05 ("Resolution condemning the offensive and discriminatory training video shown to San Francisco 49er players"); Resolution No. 308-03 ("Resolution urging Senator Rick Santorum to step down from his leadership position in the Republican Party and to apologize for his comments [comparing homosexuality to polygamy, incest, and adultery]"); Resolution No. 199-00 ("Resolution urging Dr. Laura Schlessinger to refrain from making inaccurate statements about gays and lesbians that incite violence and hate"); *see also American Family Ass'n*, 277 F.3d at 1119-23 (concluding that a letter and two resolutions by the San Francisco Board of Supervisors criticizing religious groups for denouncing homosexuality did not violate the Establishment Clause).

[14] Just as the "overall holiday setting" can change the message conveyed by a crèche, and a "typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content," *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring), the Board's well-established practice of responding whenever the equality of gay and lesbian families is called into question necessarily colors the message conveyed by the Resolution. In adopting the Resolution, consistent with past practice, the Board sought to champion same-sex families and nondiscrimination as to gays and lesbians. An objective observer would understand as much.

C.

[15] Last, we consider whether government action "foster[s] excessive governmental entanglement with religion." *Vasquez*, 487 F.3d at 1255. "Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion." *Vernon*, 27 F.3d at 1399. Entanglement in the form of "political divisiveness," that is, government actions that cause the public to fracture along religious lines, " 'has never been relied upon as an independent ground for holding a government practice unconstitutional.' " *American Family Ass'n*, 277 F.3d at 1123 (quoting *Brown*, 27 F.3d at 1383).

Catholic League's primary argument is that the resolution fosters excessive entanglement by taking "an official position on religious doctrine," and that the Board has attempted to "improperly influence Church authority and meddle in Church affairs." The case cited by Catholic League, *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d 6600 Cir. 2002), simply does not support its argument that the Board's non-binding Resolution fosters excessive entanglement.

Commack held that New York's statutes prohibiting fraud in the sale of kosher food violated the Establishment Clause by fostering excessive entanglement. *Id.* at 425. The Second Circuit concluded that the laws "excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; [and] (2) require the State to take an official position on religious doctrine . . . ." *Id.*

[16] The laws challenged in *Commack* are different in kind than the Board's Resolution here. New York's kosher fraud laws took sides in a religious matter in that they took one definition of kosher, codified it, and regulated it, to the exclusion of other competing doctrines of kashrut within Judaism.[14] *See id.* at 426. The laws took an official position on religious doctrine because determining whether each food article met kashrut's requirements, the State had to "either interpret religious doctrine or defer to the interpretations of religious officials." *Id.* at 427. By contrast, the Board's Resolution did not codify one strain of Catholic belief. It did not "take sides in a religious matter," nor an "official position on religious doctrine." The Board expressed its secular view in a non-binding resolution on a matter of public policy.

Nor does the Resolution attempt to influence Church policy in a way that creates excessive entanglement. To be sure, the Establishment Clause prohibits government from intervening in a religious dispute. The federal courts "are not arbiters of scriptural interpretation." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). But the Board has not crossed that line with its non-binding resolution; the resolution enacts no policy or regulation—it is simply a statement of the Board's position on same-sex adoption.[15]

---

[14] As explained in *Commack*, "kashrut" is "the Hebrew noun from which the term 'kosher' is derived," and "encompasses the entire body of rules relating to foods that may be consumed as well as to the preparation of those foods" under this "centuries-old Jewish law." *Commack*, 294 F.3d at 418.

[15] The complaint also alleged that the Board "threatened to withhold funding from Catholic Charities of the Archdiocese of

IV.

"[I]t is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in judgment). Invalidating government action where this incidental overlap is present would create "chaos," *id.* at 70, and cripple the government's ability to take "action that affect[s] [all] potentially religious issues, including abortion, alcohol use, [and] other sexual issues." *American Family Ass'n*, 277 F.3d at 1123. The rights of same-sex families are no different.

[17] Properly contextualized, the Resolution does not have the purpose or primary effect of expressing hostility towards Catholic religious beliefs, and it does not foster excessive government entanglement with the Catholic Church. Accordingly, the judgment of the district court is **AFFIRMED**.

San Francisco if they do not violate Church teaching and oppose Church authority." The district court did not address this allegation in its *Lemon* analysis. Catholic League's cursory reference to this allegation in its brief is not an argument as to why this allegation supports an Establishment Clause violation; therefore we consider this allegation abandoned as a basis for Catholic League's Establishment Clause claim.

BERZON, Circuit Judge, concurring:

I concur in the majority's opinion, as it carefully and faithfully applies contemporary Establishment Clause jurisprudence to an unusual circumstance, the disapproval rather than approval of religion, embodied in a single Board of Supervisors resolution linked to no affirmative governmental regulation nor displayed in any continuing fashion in any public location.

In particular, this case is largely controlled by *American Family Association v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), which also involved San Francisco Board of Supervisors resolutions supporting equality for gays by calling upon persons with religious views to the contrary — in that instance, calling on the "Religious Right," to cease denouncing and opposing tolerance toward gays and lesbians. Similarly to the Resolution here at issue, the ones in *American Family* denounced religion-based anti-gay views as " 'erroneous and full of lies,' " and denounced anti-gay advertisements by "the Religious Right" as " 'creat[ing] an atmosphere which validates oppression of gays and lesbians,' " and encouraging mistreatment of and violence toward them. *Id.* at 1119-20. The *American Family* majority recognized that "the documents contain statements from which it may be inferred that the [supervisors] are hostile towards the religious view that homosexuality is sinful or immoral," *id.* at 1122, but concluded that, as a whole, the primary effect of the documents was "encouraging equal rights for gays and discouraging hate crimes," *id.* at 1122-23, and that, as here, "[t]he excessive entanglement prong does not easily fit the current case." *Id.* at 1123.

The only possible basis for a different outcome in this case than in *American Family* is that Establishment Clause law has been slightly refined since *American Family*, and now requires, for the purpose prong of the analysis, that the governmental action not have a predominantly religious purpose, rather than that the governmental action be "motivated *wholly* by an impermissible purpose." *Id.* at 1121. *See McCreary County v. ACLU*, 545 U.S. 844, 862-63 (2005). But the secular purpose here is considerably more evident than in *American Family*, as the Resolution was directed not simply at expression of opinion but at urging a particular, secular result — that Catholic Charities place adoptive children with same-sex couples. That purpose is plainly the predominant one, although the Resolution does criticize a Vatican document disapproving adoptions by same-sex couples. I therefore see no basis for distinguishing *American Family* on the basis of *McCreary*, as any difference in the strength of the secular purpose cuts in favor of a stronger secular purpose here, sufficient to meet the *McCreary* standard.

All of that said, I do find the result troublesome, and find much to agree with in Judge Noonan's eloquent dissent in *American Family*. *See American Family*, 277 F.3d at 1126-28 (Noonan, J., dissenting). In particular, I am acutely aware that "the Constitution assures religious believers that units of government will not take positions that amount to the establishment of a policy condemning their religious belief," *id.* at 1126, and that resolutions such as the ones in *American Family* and the one in this case are near — if not at — the line that separates establishment of such a policy.

For that reason, I think it critical that the result in *American Family* and in this case be understood as limited by three considerations — first, that no regulation at all was attached to the resolutions — they were purely speech, albeit governmental speech; second, that the speech was broadcast to the public, as far as appears in the opinions, only by the enactment of the resolution itself, and not in any other, more intrusive and permanent way — for example, through plaques in public places, or advertisements in newspapers or on radio; and third, that the resolutions were not repeated or pervasive, but discrete. If any of these circumstances were different, I would think that the notion that there was an establishment of religion rather than the predominant pursuit of a secular purpose with a predominantly secular effect would have considerably more force, and the result might be otherwise. So, for example, a pervasive public campaign by a city to condemn Jews for not shopping on Saturday or Muslims from observing Ramadan because of the effect on the economy would probably trigger Establishment Clause concerns not here present. We need not address such matters here, however, as the Resolution, as far as the record shows, was passed but then left dormant, and so did not pervade public perception of Catholicism or Catholics as would a public advertisement campaign.

With those caveats, I concur in the opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 06-2351 MHP

[Filed November 30, 2006]

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, DR. RICHARD SONNENSHEIN, and VALERIE MEEHAN,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN, in his official capacity as President, Board of Supervisors, City and County of San Francisco, and TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors, City and County of San Francisco,

Defendants.

MEMORANDUM & ORDER
Re: Defendants' Motion to Dismiss

Plaintiffs Catholic League for Religious and Civil Rights, Dr. Richard Sonnenshein, and Valerie Meehan

(collectively "plaintiffs") filed this action against defendants City and County of San Francisco, Aaron Peskin, and Tom Ammiano (collectively "defendants" or "the City") alleging that defendants violated the Establishment Clause of the First Amendment to the United States Constitution. The dispute arises over a resolution passed by the Board of Supervisors in response to a statement by the Congregation for the Doctrine of Faith at the Vatican concerning the adoption of children by same-sex couples. Now before the court is defendants' motion to dismiss plaintiffs' complaint for failure to state a claim on which relief can be granted. Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

The Catholic League for Religious and Civil Rights is a Catholic civil rights organization organized to defend the right of Catholics to participate in American public life without defamation or discrimination. Compl. ¶ 10. The League has approximately 6,000 members residing in the City and County of San Francisco. Id. Plaintiffs Sonnenshein and Meehan are Catholic residents of San Francisco. Id. ¶¶ 11–12. Plaintiffs assert that the religious teachings of the Catholic Church require the disapproval of homosexual behavior and prohibit the legal recognition of homosexual unions. Id. ¶ 20. Plaintiffs further claim that, under Catholic teachings, "[a]llowing children to be adopted by persons living in such [homosexual] unions would actually mean doing violence to these children," and therefore "Catholic

organizations must not place children for adoption in homosexual households." Id. ¶ 21.

Consistent with these tenets, the Congregation for the Doctrine of the Faith ("Congregation"), an organization within the Catholic Church charged with "promot[ing] and safeguard[ing] the doctrine on the faith and morals throughout the Catholic world," issued a document in 2003 entitled "Considerations Regarding Proposals To Give Legal Recognition To Unions Between Homosexual Persons" ("Considerations document"). Id. ¶ 28; Defendants' Request for Judicial Notice ("RJN"), Exh. A. According to plaintiffs, "[t]his document outlines the moral duty of Catholics to oppose homosexual unions and policies that allow homosexual partners to adopt children," policies which the document describes as "'gravely immoral.'" Compl. ¶ 28.

In March 2006, Cardinal William Joseph Levada, the head of the Congregation for the Doctrine of the Faith, issued a directive to the Archdiocese of San Francisco instructing the Archdiocese to stop placing children in need of adoption with homosexual households. Compl. ¶ 29; RJN, Exh. F. That same month, the San Francisco Board of Supervisors Unanimously adopted Resolution No. 168-06 ("the Resolution"), which reads:

> Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing

children in need of adoption with homosexual households.

WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and

WHEREAS, The statement of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity

> as head of the Congregation of the Doctrine of Faith [sic] at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

Compl. ¶ 29; RJN, Exh. F. Plaintiffs also allege that defendants have threatened to withhold funding from Catholic Charities of the Archdiocese of San Francisco if they comply with the Cardinal's directive. Compl. ¶ 31.

Plaintiffs filed their complaint on April 4, 2006, alleging that Resolution 168-06 violates the Establishment Clause of the First Amendment to the United States Constitution, and requesting that the court permanently enjoin defendants from criticizing and attacking religion and religious beliefs. Defendants now move to dismiss the complaint, alleging that plaintiffs have failed to plead a cognizable claim under the Establishment Clause.

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule 12(b)(6) focuses on the "sufficiency" of a claim—and not the claim's substantive merits—"a court may [typically] look only at the face of the complaint to decide a motion to dismiss." Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Although the court is generally confined to consideration of the allegations

in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.), cert. denied, 484 U.S. 944 (1987). Similarly, the court may consider documents that are not physically attached to the complaint where the authenticity of the documents is not contested and the complaint necessarily relies on them. Lee v. City of Los Angeles, 250 F.3d 668, 688–89 (9th Cir. 2001). In addition, pursuant to Federal Rule of Evidence 201, "a court may take judicial notice of 'matters of public record'" without converting a motion to dismiss under Rule 12(b)(6) into a motion for summary judgment. Id. (quoting Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986)).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45–46 (1957). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact or unreasonable inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Clegg v.

Cult Awareness Network, 18 F.3d 752, 754–55 (9th Cir. 1994).

DISCUSSION

I. Judicial Notice

Defendants have requested that the court take judicial notice of several documents pursuant to Federal Rule of Evidence 201. For the purposes of a 12(b)(6) motion to dismiss, the court may take judicial notice of "matters of public record." Lee, 250 F.3d at 688–89. Therefore, the court will take judicial notice of RJN, Exh. D (Assembly Bill No. 205), Exh. F (Resolution 168-06), Exh. H (San Francisco Board of Supervisors Resolutions Numbered 129-06, 166-06, 364-06, 73-05, 127-05, 454-05, 308-03 and 199-00) and Exh. I (Grant Agreements between the City and County of San Francisco and Catholic Charities). In addition, the court is free to consider for the purposes of this motion RJN, Exh. A, "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons," because the authenticity of this document is not in dispute and plaintiffs' complaint relies on it. Lee, 250 F.3d at 688.

The court will not take judicial notice of the remaining documents, which are news articles and not matters of public record. Likewise, the court will not consider the factual assertions made by either party that go beyond the complaint or the documents discussed above, such as the religious affiliations and/or "lifestyles" of City officials.

II. Establishment Clause

In cases alleging that a state actor has violated the Establishment Clause by disapproving a particular religion, the Ninth Circuit applies the test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Vernon v. City of Los Angeles, 27 F.3d 1385, 1396 (9th Cir. 1994). Under this test, the challenged action must "(1) have a secular purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion." Id. If Resolution 168-06 fails any one of these three prongs, it is invalid under the Establishment Clause. Id. at 1396–97.

A. American Family Ass'n, Inc. v. City & County of San Francisco

This is not the first time the City has clashed with a religious group over statements regarding homosexuality. Indeed, the facts of American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114 (9th Cir. 2002), are so similar to the case at bar as to warrant a thorough discussion.

In American Family Ass'n, the plaintiffs were religious groups that ran an advertising campaign identifying homosexuality as a "sexual sin" and claiming that "many have walked out of homosexuality." Id. at 1119. The ads also claimed that homosexuals were more likely to engage in "self-destructive behavior," including alcohol, drug abuse, emotional and physical violence, and acquiring sexually transmitted diseases. Id.

The City took several steps in response to the ad campaign. First, the Board of Supervisors sent a letter to the plaintiffs denouncing their "hateful rhetoric against gays, lesbians and transgendered people," and claiming that "there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians." Id. In addition to this letter, the City adopted two resolutions. Id. One condemned the murder of a gay man in Alabama and urged Alabama lawmakers to extend hate crime protection to homosexuals. Id. The resolution included a paragraph that "calls for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes" such as the murder in Alabama. Id. The second resolution targeted anti-gay advertisements, naming one of the plaintiffs by name. Id. at 1119–20. The resolution stated that ads insinuating that sexual orientation could be changed are "erroneous and full of lies," and further stated that "ads suggesting gays or lesbians are 'immoral and undesirable create an atmosphere which validates oppression of gays and lesbians' and encourages maltreatment of them." Id. at 1120.

Subsequently, the plaintiffs sued the City alleging that the letter and resolutions violated the Establishment Clause. Id. at 1120. The district court dismissed the complaint for failure to state a claim and the Ninth Circuit affirmed. Applying the Lemon test, the Ninth Circuit addressed each prong in turn.

Beginning with the purpose prong, the Ninth Circuit held that "although the letter and resolutions may appear to contain attacks on the plaintiffs' religious views, in particular that homosexuality is sinful, there is also a plausible secular purpose in the defendants' actions—protecting gays and lesbians from violence—and that therefore the plaintiffs could not state a claim under the purpose prong." Id. at 1121. The court further noted that "any secular purpose, no matter how minimal, will pass the test." Id. at 1122. The Supreme Court recently clarified the purpose prong, however, and this highly deferential standard no longer applies. Rather, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." McCreary County, Kentucky v. Am. Civil Liberties Union of Kentucky, ___ U.S. ___, 125 S.Ct. 2722, 2735 (2005). Where the purported secular purpose is "secondary" and the purpose of the statute is "a predominantly religious one," the government action fails the purpose prong. Id. at 2736. Taken together, these cases establish that the protection of gay and lesbian rights is a legitimate secular purpose, and that this purpose will defeat a claim based on the purpose prong so long as it is not secondary to a predominantly religious purpose.

Turning to the primary effect prong, the Ninth Circuit held in American Family Ass'n that the provision in the City's Alabama resolution pertaining to the Religious Right's accountability for its rhetoric against gays and lesbians was "more of an afterthought and any disparagement of the Religious Right is not the primary effect of the resolution. Read as a whole, the primary effect is a denouncement of hate crimes and a call for action by the Alabama legislature." American Family Ass'n, 277 F.3d at 1122.

Regarding the other resolution and the letter, the court stated that they presented a "closer question" in that the documents were "directly aimed at the plaintiffs and both documents contain[ed] statements from which it may be inferred that the defendants are hostile towards the religious view that homosexuality is sinful or immoral." Id. However, the court concluded that this hostility "was not the principal effect of the defendants' actions," and that the documents, "read in context and as a whole, are primarily geared toward promoting equality for gays and discouraging violence against them." Id. Any "statements from which disapproval can be inferred [were] only incidental and ancillary." Id. at 1123.

Finally, the court held that the City's actions did not amount to excessive entanglement, because "[p]olitical divisiveness . . . has never been relied upon as an independent ground for holding a government practice unconstitutional." Id. at 1123 (internal quotations omitted).

B. Resolution 168-06

Given the similarities between the facts as alleged in plaintiffs' complaint and the circumstances in American Family Ass'n, the court will consider Resolution 168-06 using the framework of that case, while addressing the key differences between the two situations.

1. Secular Purpose

"The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." McCreary County, 125 S.Ct. at 2734 (internal quotations omitted). This hypothetical objective observer is also "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." Id. at 2737.

Defendants assert that the purposes of Resolution 168-06 were "to denounce discrimination against same-sex couples, and to try to preserve for San Francisco children the opportunity to be placed for adoption with qualified families without regard to sexual orientation." These purposes are evident from the wording of the resolution. The preamble to the Resolution identifies it as urging Cardinal Levada "to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households." Compl. ¶ 29. The Resolution condemns the Vatican's attempt to "meddl[e] and . . . negatively influence" the City's established customs and traditions regarding adoption by same-sex couples, and claims that "[s]ame-sex couples are just as qualified to be parents as are heterosexual couples." Id. The Resolution urges the Archbishop and Catholic Charities serving San Francisco to "defy all discriminatory directives of Cardinal Levada," and the operative clause repeats the urge to Cardinal Levada from the preamble. Id. While the Resolution also contains direct attacks on Cardinal

Levada's statements in the Considerations document, calling them "hateful and discriminatory," "absolutely unacceptable," "insulting and callous," and showing "insensitivity and ignorance," these provisions regarding the Congregation's statement of religious doctrines are secondary to the Resolution's main purpose of promoting adoption by same-sex couples and equality for homosexuals.

Plaintiffs assert that the actual purpose of Resolution 168-06 is "to criticize and condemn the Catholic Church, Catholic religious leaders, and Catholic religious beliefs," and to "meddle in Church affairs." Plaintiffs further point to the Resolution's reference to the Vatican as a "foreign country" and describing the Congregation for the Doctrine of the Faith as the former "Holy Office of the Inquisition" as evincing anti-Catholic bigotry. Plaintiffs' generalized characterizations of the Resolution's language are unconvincing. It is clear from the text of the statute that any criticism of Catholic leaders or policies are presented in the context of same-sex adoption—a secular dimension of the City's culture and tradition that the City believes is threatened by the specific directive issued to the Archdiocese. Furthermore, the reference to the Vatican as a "foreign country" can reasonably be interpreted as an explicit attempt by the Board of Supervisors to characterize the City's dissent as one against a political entity rather than a religious organization, thereby seeking to avoid a religious conflict. While reference to the Holy Office of Inquisition may have been unnecessary to the substance of the Resolution and may be perceived as pejorative, it does not change the primary purpose or gist of the Resolution. It also is not historically inaccurate.

Accordingly, plaintiffs have failed to establish that the primary purpose of Resolution 168-06 is a religious one.

2. Primary Effect

The effect prong of the Lemon test addresses "whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion," Vernon, 27 F.3d at 1398. This determination, like the purpose inquiry, is conducted from the perspective of an informed, reasonable observer who is "familiar with the government practice at issue." Kreisner v. City of San Diego, 1 F.3d 775, 784 (9th Cir. 1993). A government action having the effect of perceived hostility toward a religious group does not violate the Establishment Clause as long as the hostility is not the action's primary effect. See American Family Ass'n, 277 F.3d at 1122–23; see also Vernon, 27 F.3d at 1398–99.

In Vernon, the City of Los Angeles investigated whether an Assistant Police Chief's religious views were "improperly shaping the operations and policies of the Los Angeles Police Department." Id. at 1389. Specifically, the city was concerned that the officer's beliefs were leading him to discriminate against gays, lesbians and women in hiring and promotion, and that the officer was consulting religious elders on issues of public policy. Id. at 1389–90. The officer alleged that this investigation violated the Establishment Clause by disfavoring his religion. Id. at 1390. Regarding the investigation's primary effect, the Ninth Circuit found that the city's concern with the officer's consultation of religious leaders "suggests that the city disapproved of

such consultation, possibly due to the particular religious beliefs underlying such consultation." Id. at 1398. However, the court went on to hold that "[n]otwithstanding the fact that one may infer possible city disapproval of Vernon's religious beliefs from the direction of the investigation, this cannot objectively be construed as the primary focus or effect of the investigation. The primary purpose of the government action was the investigation of any possible impermissible or illegal on-duty conduct of Vernon." Id. at 1398–1399.

Likewise, in American Family Ass'n, the Ninth Circuit found that the City's resolution and letter were "directly aimed at the plaintiffs" and contained "statements from which it may be inferred that the defendants are hostile towards the religious view that homosexuality is sinful or immoral." American Family Ass'n, 277 F.3d at 1122. The City's actions nonetheless did not violate the Establishment Clause because the perceived hostility was not the "principal effect" of the government action. Id. Rather, "[t]he documents, read in context as a whole, are primarily geared toward promoting equality for gays and discouraging violence against them." Id.

Unlike the government actions at issue in Vernon and American Family Ass'n, the language in Resolution 168-06 can be interpreted as explicitly hostile toward the Congregation's views regarding homosexuality and adoption by same-sex couples. No inference is necessary to conclude that the Resolution espouses opposition to a religious view as expressed in the Considerations document. This hostility alone, however, is not fatal to the Resolution's constitutionality unless the hostility is the *primary*

effect of the Resolution. Plaintiffs have failed to establish that this is the case.

Read as a whole, the Resolution is explicitly directed at promoting same-sex adoption and non-discrimination, largely for the reasons discussed above. Furthermore, taking the Resolution in context reveals that the Resolution's criticisms of the statements in the Considerations document was clearly secondary to the city's concern with the policies of the Archdiocese regarding adoption. The Considerations document was released in 2003. It was not until the Congregation issued its directive to the Archdiocese three years later that the City passed Resolution 168-06. Accordingly, the primary effect of the Resolution was to voice the City's views with respect to adoption, a secular activity. The fact that the City was commenting on the policy of the Archdiocese in this regard does not violate the Establishment Clause simply because the secular activity was being performed by a religious organization. See Bowen v. Kendrick, 487 U.S. 589, 613 (1988) (holding that activities such as "adoption counseling and referral services" were not "specifically religious activities" and were "not converted into such activities by the fact that they [were] carried out by organizations with religious affiliations"). Similarly, the Resolution's entreaty to the Archdiocese to defy Cardinal Levada's discriminatory directives, though ostensibly an attempt to influence the general policies of a religious organization, is primarily secular, as it is principally geared toward promoting an adoption policy rather than meddling with internal church affairs.

The Resolution's primary effect of fostering non-discrimination is also evident when viewed in the context of the City's history of adopting similar resolutions promoting gay and lesbian rights.[1] As these previous resolutions demonstrate, the City often takes public, official positions regarding the rights of homosexuals and has criticized a variety of prominent individuals and organizations for their stances on homosexuality. Resolutions promoting non-discrimination against homosexuals, such as Resolution 168-06, do not implicate the Establishment Clause simply because they are adopted in response to the actions of a religious organization.

Accordingly, the primary message of Resolution 168-06 is neither an endorsement nor a disapproval of religion, but rather a promotion of adoption by same-sex couples and non-discrimination against gays and lesbians.

3. Excessive Entanglement

The final prong of the Lemon test asks whether the government action fosters excessive entanglement with religion. The Establishment Clause forbids both "administrative" and "political" entanglement. Vernon, 27 F.3d at 1399. "Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion." Id. Political entanglement and divisiveness, while of concern to courts in Establishment Clause cases, is insufficient by itself to constitute excessive entanglement. Id. at 1401; American Family Ass'n, 277 F.3d at 1123.

Plaintiffs' complaint contains no facts supporting excessive entanglement, but rather alleges conclusorily

that the Resolution "creates excessive entanglement with religion." Compl. ¶ 40. In their pleadings, plaintiffs assert that "[a] formal resolution in which the government takes an official position on religious doctrine or takes sides in a religious matter fosters entanglement prohibited by the Establishment Clause." Opp. at 21. The cases cited by plaintiffs do not support this broad definition of entanglement.

In Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002), the Second Circuit struck down portions of New York's kosher fraud laws as violating the Establishment Clause. The laws imposed a "prohibition on the sale of food products falsely represented 'to be kosher . . . or as having been prepared under . . . the orthodox Hebrew religious requirements.'" Id. at 419 n.3 (quoting N.Y. AGRIC. &MKTS. LAW § 201-a(1)). The law defined the term "kosher", created a regime of inspection, regulation, and supervision of kosher food products and provided for civil and criminal penalties for violations of its provisions. Id. at 423–425. The court found excessive entanglement because "the State [had] effectively aligned itself with one side of an internal debate within Judaism," the law required the State to "either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position," and the law amounted to "a fusion of governmental and religious functions." Id. at 426-28. The problematic legislation at issue in Commack required the state to directly engage in complex, competing doctrines of religious law and adopt official interpretations of that law. The statute therefore mandated the type of "comprehensive, discriminating, and continuing state surveillance of religion" forbidden by the Establishment Clause. Vernon, 27 F.3d at 1401.

It was not simply the promulgation of an official position regarding a secular issue, as is Resolution 168-06.

Plaintiffs also cite Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952), a case decided before the now-familiar entanglement test was established. Kedroff held that internal church governance and membership must be administered by church officials free of government control. Id. 116–17. This case, too, is inapplicable. Resolution 168-06 is not an attempt to control church policy. Rather, the Resolution is a non-binding and non-regulatory announcement of the City's views with respect to same-sex adoption. The City's involvement with the Archdiocese arising from Resolution 168-06 began and ended when the Resolution was adopted.

The facts of the case at bar raise interesting questions about the public debate of political issues vis-a-vis religious views and doctrines. Accepting plaintiffs' position would mean that any religiously-initiated debate even on a political issue could not be joined by a publicly-elected body's response without resulting in excessive entanglement. The Congregation's Considerations document not only states the Vatican's position with regard to homosexual unions, but also instructs Catholic politicians as to their duties as Catholics. Article IV, section 10 of the document states that

> If it is true that all Catholics are obliged to oppose the legal recognition of homosexual unions, Catholic politicians are obliged to do so in a particular way, in keeping with their responsibility as politicians. Faced with

> legislative proposals in favour of homosexual unions, Catholic politicians are to take account of the following ethical indications.
>
> When legislation in favour of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic law-maker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favour of a law so harmful to the common good is gravely immoral.
>
> When legislation in favour of the recognition of homosexual unions is already in force, the Catholic politician must oppose it in ways that are possible for him and make his opposition known; it is his duty to witness to the truth.

Section 10 goes on to state that it is the duty of the Catholic politician to seek the total abrogation, or at least the partial repeal, of legislation in favor of homosexual unions.

The Congregation for the Doctrine of the Faith provoked this debate, indeed may have invited entanglement, by its Considerations statement. This court does not find that our case law requires political bodies to remain silent in the face of this provocation. See Vernon, 27 F.3d at 1397 (discussing cases in which government actions targeting religious conduct were upheld where the actions were designed to avoid Establishment Clause violations). Elected officials are certainly free to express their electorates' views. R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 918 (9th Cir. 2005) (quoting Keller v. State Bar of Cal., 496 U.S. 1, 12–13 (1990)) ("Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of

their constituents"). Ordinarily this is done in the form of a resolution or similar statement adopted by the political body.

In view of Article IV, section 10, of the Considerations statement, Resolution 168-06 is a measured response. It does not constitute excessive entanglement under existing case law. There is no regulatory enforcement, no law adopted nor other action taken by virtue of the Resolution. It is merely the exercise of free speech rights by duly elected office holders. In sum, Resolution 168-06 does not create an impermissible entanglement between government and religion. Because plaintiffs have also failed to establish that Resolution 168-06 lacks a primarily secular purpose or a primarily secular effect, plaintiffs have failed to plead a cause of action under the Establishment Clause.

CONCLUSION

For the reasons stated above, the court GRANTS defendants' motion to dismiss. The action DISMISSED in its entirety with prejudice. The clerk shall close the file.

IT IS SO ORDERED.

Dated: Nov. 28, 2006 /s/ M. H. Patel
MARILYN HALL PATEL
District Judge
United States District Court
Northern District of California

ENDNOTES

1. The court has taken judicial notice the following resolutions adopted by the City: Resolution 129-06, urging the IRS to acknowledge domestic partnerships; Resolution 166-06, urging Governor Schwarzenegger to submit an amicus brief to the New York Supreme Court of Appeals in support of same-sex marriage; Resolution 364-06, condemning government-sanctioned violence at Moscow's first Gay Pride Celebration and urging Moscow officials to support the rights of Russia's LGBT community; Resolution 73-05, urging the United States Supreme Court to accept the hearing of a legal challenge to Florida's prohibition of adoption of children by gays and lesbians; Resolution 127-05, urging U.S. Secretary of Education Margaret Spellings to retract her condemnation of PBS programming depicting a lesbian couple, and urging Spellings to apologize and support tolerance for the LGBT community; Resolution 454-05, condemning a San Francisco 49ers training video that was offensive to the LGBT community; Resolution 308-03, urging Senator Rick Santorum to resign as a Republican Senate leader and apologize for comments likening homosexuality to polygamy, incest, and adultery; and Resolution 199-00, urging Dr. Laura Schlessinger to refrain from making inciteful comments about gays and lesbians and urging media companies to discontinue Schlessinger's radio program if she continued to make such statements. RJN, Exh. H.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 06-2351 MHP

[Filed November 30, 2006]

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, DR. RICHARD SONNENSHEIN, and VALERIE MEEHAN,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN, in his official capacity as President, Board of Supervisors, City and County of San Francisco, and TOM AMMIANO,in his official capacity as a Supervisor,Board of Supervisors, City and County of San Francisco,

Defendants.

JUDGMENT

This matter having come on for hearing on defendants' motion to dismiss, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed granting the defendants' motion, this action is dismissed in its entirety with prejudice and now therefore,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants on all claims as to all plaintiffs, and that the action is dismissed on the merits with prejudice.

/s/ M. H. Patel
MARILYN HALL PATEL
Date: Nov. 28, 2006 United States District Judge

184

No. 10-1034

Supreme Court, U.S.
FILED
MAR 25 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, DR. RICHARD SONNENSHEIN, and VALERIE MEEHAN,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN, in his official capacity as President, Board of Supervisors of San Francisco, and TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors for San Francisco,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN AND TOM AMMIANO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Counsel of Record
CHRISTINE VAN AKEN
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-4674
Facsimile: (415) 554-4747
vince.chhabria@sfgov.org

Attorneys for Respondents City and County of San Francisco, Aaron Peskin and Tom Ammiano

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should the Court grant certiorari to revisit the nonprecedential opinion of three judges from an eleven-member en banc panel of the Ninth Circuit that the San Francisco Board of Supervisors did not violate the Establishment Clause when it passed a nonbinding resolution criticizing a religious leader for directing a social service agency in San Francisco to stop placing children for adoption with same-sex couples?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT	1
ARGUMENT	15
I. THE SUBSTANTIVE ESTABLISHMENT CLAUSE QUESTION PRESENTED BY THIS CASE IS NOT WORTHY OF CERTIORARI	15
A. The Ruling Below Created No New Establishment Clause Law	16
B. The Three-Judge Opinion Does Not Conflict With Any Other Court Decision	17
C. The Facts Of This Case Are Highly Unusual And Present No Important Or Recurring Question That Requires Resolution	19
D. Judge Silverman's Three-Judge Opinion Correctly Applied The Law To The Unusual Facts Of This Case	21
II. THE NINTH CIRCUIT'S DECISION ON STANDING IS NOT WORTHY OF CERTIORARI	25
CONCLUSION	29

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Am. Family Ass'n v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2002).....20

Arizona Christian School Tuition Org. v. Winn, No. 09-987 29

Bond v. Floyd, 385 U.S. 116 (1966).....24

Bowen v. Kendrick, 487 U.S. 589 (1988).....9, 24

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).....18, 20

Edwards v. Aguillard, 482 U.S. 578 (1987).....18

Epperson v. Arkansas, 393 U.S. 97 (1968).....18

Flora v. White, 692 F.2d 53 (8th Cir. 1982).....28

In re Navy Chaplaincy, 534 F.3d 756 (D.C. Cir. 2008).....26, 28

Keller v. State Bar of California, 496 U.S. 1 (1990).....24

Lemon v. Kurtzman, 403 U.S. 602 (1971).....*passim*

Lynch v. Donnelly, 465 U.S. 668 (1984).....9

McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).....12, 22

McGowan v. Maryland, 366 U.S. 420 (1961).....9, 23

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).....17

Nevius v. Sumner, 105 F.3d 453 (9th Cir. 1996).....16

Newdow v. Lefevre, 598 F.3d 638 (9th Cir. 2010).....28

O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005).....20, 21

TABLE OF AUTHORITIES – Continued

Page

Okwedy v. Molinari, 150 F.Supp.2d 508 (E.D.N.Y. 2001) 20

Okwedy v. Molinari, 69 Fed.Appx. 482 (2d Cir. 2003) 20

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 18

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 10, 26, 27, 28

Van Orden v. Perry, 545 U.S. 677 (2005) 20

Vasquez v. Los Angeles County, 487 F.3d 1246 (9th Cir. 2007) 28

Warth v. Seldin, 422 U.S. 490 (1975) 15

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 20

RULES

S.Ct. Rule 10(a) 17

S.Ct. Rule 10(b) 17

S.Ct. Rule 10(c) 17

OTHER REFERENCES

Cardinal Levada's Edict, S.F. Chron., Mar. 19, 2006 ..... 2, 3

Vatican opposition to LGBT adoption prompts Newsom to nix Rome trip, Fog City J. Mar. 13, 2006 3

STATEMENT

The San Francisco Board of Supervisors passed a nonbinding resolution criticizing Cardinal William Joseph Levada for directing a Catholic social service agency in San Francisco to stop placing children for adoption with same-sex couples. Petitioners sued under the Establishment Clause, the district court dismissed the complaint, and an en banc panel of the Ninth Circuit affirmed, but without a majority agreeing on the reason for doing so. Due to the fractured nature of the decision below, the uniqueness of the facts of the case, and petitioners' failure to discuss most of those facts, a relatively lengthy background statement is required.

1. In 2003, the Vatican's Congregation for the Doctrine of the Faith published a document entitled "Considerations Regarding Proposals To Give Legal Recognition To Unions Between Homosexual Persons." The purpose of the "Considerations" document was to "give direction to Catholic politicians by indicating the approaches to proposed legislation in this area which would be consistent with Christian conscience." Resp. C.A. Br. 3.

"Homosexual acts," the Considerations document asserted, "are intrinsically disordered." *Id.* Accordingly, "in those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty." *Id.*

The Considerations document further specified that Catholic lawmakers must oppose efforts to place children for adoption with same-sex couples. That is because, according to the statement, "[a]llowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development." *Id.* at 4.

In March 2006 (roughly three years after the Vatican published the "Considerations" document), Cardinal William Joseph Levada, by then head of the Congregation for the Doctrine of the Faith but formerly the Archbishop in San Francisco, issued a directive to the Archdiocese of San Francisco that "Catholic agencies should not place children for adoption in homosexual households." *Id.* Cardinal Levada cited the 2003 Considerations document in support of his directive. *Id.* As a result, the Archdiocese of San Francisco announced it would no longer allow same-sex couples to adopt children through its Catholic Charities agency. *Id.*

This directive was generally not well-received in San Francisco. The San Francisco Chronicle published a stinging editorial, which asserted that the Vatican should be more concerned with "a backlog of some 700 priest-abuse cases" than with "enforcing outdated edicts that rip [communities] apart." *Cardinal Levada's Edict*, S.F. Chron., Mar. 19, 2006, at D-6. Then-Mayor Gavin Newsom, one of the Catholic

politicians the Considerations document sought to influence, cancelled a trip to the Vatican in protest. Pat Murphy and Luke Thomas, *Vatican opposition to LGBT adoption prompts Newsom to nix Rome trip*, Fog City J. Mar. 13, 2006.[1]

For its part, the San Francisco Board of Supervisors adopted a resolution criticizing Cardinal Levada's directive and urging him to withdraw it. The resolution was sponsored by then-Supervisor Tom Ammiano, another Catholic politician. *See Cardinal Levada's Edict*, *supra*. The resolution, reproduced here without all the bold and italics added by petitioner, stated as follows:

> **Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.**
>
> WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to

[1] In the proceedings below, the City requested judicial notice of the news articles cited herein, not to prove the truth of their contents, but to demonstrate the assertions they contained were in the public realm. The district court denied the request, and the Ninth Circuit, while not commenting on whether the articles were subject to judicial notice, did not rely on them.

negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and

WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and,

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the

> Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

Pet. App. 5a-6a.

Cardinal Levada, the former Archbishop of San Francisco, was likely unsurprised by this reaction. After all, the City is a worldwide leader in the struggle for lesbian and gay equality. It is one of the first in the nation to officially recognize domestic partnerships for same-sex couples. Pet. App. 99a. Entities that have contracts with the City are required to provide the same benefits to the domestic partners of their lesbian and gay employees as they provide to the spouses of their heterosexual married employees. *Id.* Since 2004, the City has been at the forefront of the legal fight to guarantee same-sex couples the right to marry in California. *Id.* And the Board of Supervisors regularly passes nonbinding resolutions relating to discrimination against lesbians and gay men. Between 2000 and 2006, it passed at least 41 such resolutions, including:

- A resolution criticizing the IRS for refusing to recognize domestic partnerships. Resp. C.A. Br. 17.
- A resolution denouncing the Russian authorities for standing by during Moscow's first Gay Pride parade while gay men and

lesbians were assaulted, and singling out the mayor of Moscow for portraying homosexuals as "sexual deviants." *Id.*

- A resolution denouncing then-Secretary of Education Margaret Spellings for her criticism of a television show that depicted a lesbian couple in a positive light and urging her to retract her statement, issue a public apology and "make a public statement in support of tolerance, multiculturalism and free speech." *Id.* at 18.

- A resolution condemning the public relations director of the San Francisco 49ers for creating an instructional video for the players that was viewed as offensive and discriminatory towards gay men and lesbians, and urging the team to work with the City's Human Rights Commission to "develop a plan of action for preventing future discrimination." *Id.*

- A resolution describing the statements of then-Senator Rick Santorum about homosexuality as "discriminatory" and "hurtful" and urging him to step down from his Senate leadership post. *Id.*

- A resolution urging Dr. Laura Schlessinger to refrain from making discriminatory statements about gay men and lesbians, and urging that her show be taken off the air if such statements continued. *Id.*

2. Petitioners – a Catholic advocacy group and two of its individual San Francisco members – sued

the City in federal court, alleging the Board's resolution violated the Establishment Clause. The district court granted the City's motion to dismiss for failure to state a claim. Applying the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court first held the Resolution's primary purpose was "to denounce discrimination against same-sex couples, and to try to preserve for San Francisco children the opportunity to be placed for adoption with qualified families without regard to sexual orientation." Pet. App. 126a. The court rejected the notion that the more incendiary aspects of the Resolution evinced an anti-religious purpose, because "any criticism of Catholic leaders or policies are presented in the context of same-sex adoption – a secular dimension of the City's culture and tradition that the City believes is threatened by the specific directive issued to the Archdiocese." *Id.* at 127a. For similar reasons, the district court concluded the Resolution did not run afoul of *Lemon*'s "primary effect" prong, because a reasonable observer familiar with the context and timing of the Resolution, and with the City's history of promoting lesbian and gay equality, would conclude the Resolution was intended to be secular. Applying the third prong of *Lemon*, the district court rejected the notion that the Resolution created excessive entanglement with religion, reasoning: "There is no regulatory enforcement, no law adopted nor other action taken by virtue of the Resolution. It is merely the exercise of free speech rights by duly elected office holders." *Id.* at 135a.

3. A three-judge panel of the Ninth Circuit affirmed. The panel concluded the Board's secular purpose was evident from the title and preamble of the Resolution, which focused singularly on the Board's desire that Catholic Charities continue to place children for adoption with same-sex couples. Pet. App. 96a-97a. The panel also emphasized the timing of the resolution, observing that the Board did not act in response to the more general Considerations document released in 2003, but three years later, in response to Cardinal Levada's policy directive concerning adoptions in San Francisco. *Id.* at 97a.

Applying *Lemon*'s "effects" prong, the panel acknowledged that "there are statements in the Resolution that, taken in isolation, may be said to convey disparagement towards the Catholic Church," but concluded that "[c]onsidering the Resolution as a whole, with its focus on the City's tradition of promoting and defending same-sex relationships," those isolated statements did not "overwhelm the Resolution's secular dimensions." Pet. App. 105a. And the panel emphasized the City's longstanding practice of promoting lesbian and gay equality, including the Board's practice of doing so by way of nonbinding resolution:

> Just as the "overall holiday setting" can change the message conveyed by a creche, and a "typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of

> endorsement of that content," . . . the Board's well-established practice of responding whenever the equality of gay and lesbian families is called into question necessarily colors the message conveyed by the Resolution. In adopting the Resolution, consistent with past practices, the Board sought to champion same-sex families and nondiscrimination as to gays and lesbians. An objective observer would understand as much.

Pet. App. 108a (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)).

Responding to petitioner's central argument (namely, that the resolution expressed hostility towards central aspects of Catholic religious doctrine), the panel acknowledged that "what the Board considers secular, Catholic League considers hostile to Catholic religious tenets." *Id.* at 99a. But the panel reasoned that "the government is not stripped of its secular purpose simply because the same concept can be construed as religious." *Id.* at 99a-100a (quoting extensively *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) and *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988)).

Judge Berzon wrote a concurring opinion stating that the majority opinion "carefully and faithfully applie[d] contemporary Establishment Clause jurisprudence to an unusual circumstance, the disapproval rather than approval of religion, embodied in a single Board of Supervisors resolution linked to no affirmative governmental regulation nor displayed

in any continuing fashion in any public location." Pet. App. 112a, 113a. Had the government speech been accompanied by regulation, had the City broadcast the speech in a "more intrusive and permanent way," or had the City enacted a series of similar resolutions rather than just one, the outcome of the case might be different. Pet. App. 114a.

4. An en banc panel of the Ninth Circuit voted 8-3 to affirm the district court's dismissal of the complaint, but without agreement by a majority on the correct reason to affirm. Five members of the panel concluded petitioners lacked standing, three members concluded petitioners had standing but the resolution did not violate the Establishment Clause, and three members concluded petitioners had standing and the resolution did violate the Establishment Clause.

Judge Graber, writing for the five judges who found a lack of standing, deemed petitioners "akin to 'concerned bystanders' . . . who have suffered no injury 'other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'" Pet. App. 67a (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473, 485 (1982)). Reasoning that the resolution did not apply to petitioners, but rather to Cardinal Levada, the San Francisco Archdiocese and Catholic Charities, Judge Graber's opinion concluded:

> Plaintiffs here have expressed their deep and genuine offense. Their status as Catholics and San Francisco residents distinguishes their concerns, at least to some extent, from the concerns of others who may view the resolution as offensive. In the end, however, the resolution carries no legal effect and, perhaps more importantly, does not apply to Plaintiffs.

Pet. App. 69a.[2]

Writing for the three judges who concluded petitioners had standing but failed to state an Establishment Clause claim on the merits, Judge Silverman focused on both the text and the context of the resolution to determine that the City had not run afoul of the first or second prongs of *Lemon*. Regarding the text, Judge Silverman stated: "The reasons given [by the resolution for its opposition to Cardinal Levada's directive] are purely secular, not theological. For example, the resolution contains nothing like, 'The Church has misread the Bible,' or '*Our* God approves of same-sex marriage.'" Pet. App. 35a.

---

[2] Judge Graber also rejected petitioner's analogy to Establishment Clause cases involving religious displays. "In the religious display context," she stated, "a plaintiff has standing when he or she encounters the display with some level of frequency or regularity during the course of the plaintiff's typical routine. . . . Here, Plaintiffs read the resolution. But apart from that initial contact, Plaintiffs allege no facts to suggest that they ever would have reason to read the resolution again, as part of their regular routine or otherwise (except to facilitate this litigation)." Pet. App. 75a.

Regarding context, Judge Silverman wrote that the objective observer, who under Supreme Court precedent is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show," would consider the resolution in light of San Francisco's persistent efforts to achieve lesbian and gay equality, and in light of the fact that the Board enacted the measure in direct response to the Vatican's attempt to influence policy within San Francisco. *Id.* (quoting *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 866 (2005)). Regarding *Lemon*'s entanglement prong, Judge Silverman reasoned that the resolution "was an isolated, nonbinding expression of the Board of Supervisors' opinion on a secular matter, which the plaintiffs have not alleged even potentially interfered with the inner workings of the Catholic Church." Pet. App. 36a. The opinion concluded:

> We would have a different case on our hands had the defendants called upon Cardinal Levada to recant his views on transubstantiation, or had urged Orthodox Jews to abandon the laws of the kashrut, or Mormons their taboo of alcohol. Those matters of religious dogma are not within the secular arena in the way that same-sex marriage and adoption are. The speech here concerns a controversial public issue that affects the civic lives of the citizens of San Francisco, religious and nonreligious alike. I would not construe the First Amendment to prohibit elected officials from speaking out, in their official capacities, on matters of such clearly

> civil import, even if their speech is insolent, stupid, or worse. A church has every right to take a firm moral position on secular issues, but it has no right to prevent public officials from criticizing its position on those secular issues – especially when one of its clergy fires the first salvo.

Pet. App. 37a-38a.

Writing for the three judges who concluded petitioners had standing and stated a claim on the merits, Judge Kleinfeld opined that the resolution constituted unconstitutional "governmental condemnation of Catholic doctrine." Pet. App. 22a. The resolution violated *Lemon*'s "purpose" prong, in Judge Kleinfeld's view, because its text focused on the activities and statements of the Catholic Church:

> The San Francisco government would face no colorable Establishment Clause challenge had they limited their resolution to its fourth "whereas," that "[s]ame sex couples are just as qualified to be parents as heterosexual couples." San Francisco is entitled to take that position and express it even though Catholics may disagree as a matter of religious faith. But the title paragraph, the other five "whereas" clauses, and the "resolved" language are all about the Catholic Church, not same-sex couples.

Pet. App. 23a. Nor did the resolution's context, Judge Kleinfeld reasoned, turn the resolution's anti-religious purpose into a secular one, because the "reasonable

observer" under *Lemon* should not be assumed familiar with the history of San Francisco's efforts to promote lesbian and gay equality. *Id.* at 24a-25a.

Regarding *Lemon*'s "effects" prong, Judge Kleinfeld emphasized the language of the resolution, concluding that the reasonable observer would conclude it conveys a "message of disapproval" of the Catholic religion:

> The "message" in the resolution, unlike, say, the message that might be inferred from some symbolic display, is explicit: a Catholic doctrine duly communicated by the part of the Catholic church in charge of clarifying doctrine is "hateful," "defamatory," "insulting," "callous," and "discriminatory," showing "insensitivity and ignorance," the Catholic Church is a hateful foreign meddler in San Francisco's affairs, the Catholic Church ought to "withdraw" its religious directive, and the local archbishop should defy his superior's directive.

Pet. App. 27a.

Judge Kleinfeld also concluded the resolution ran afoul of *Lemon*'s entanglement prong, reasoning that San Francisco had entangled itself in matters of Church hierarchy in the same way that a Board resolution urging a district court to defy a Ninth Circuit ruling would entangle it in the hierarchy of the federal judiciary. *Id.* at 28a.

Judge Kleinfeld also wrote for the six judges who concluded petitioners had standing to challenge the resolution. This portion of Judge Kleinfeld's opinion found that the individual petitioners had standing because they alleged that their own legislature singled them out in an expression of hostility towards their religion, that they came into contact with the allegedly anti-religious speech, and that this chilled their access to government and forced them to curtail their activities to lessen their contact with their government. Pet. App. 18a. In this regard, Judge Kleinfeld reasoned, the individual petitioners alleged an injury that was concrete and specific enough to distinguish them from other members of the public who might merely find the resolution offensive and believe it to be unconstitutional. *Id.* at 9a. The opinion further concluded that Catholic League had standing because, once its San Francisco members were found to have standing, it easily satisfied the test for associational standing under *Warth v. Seldin*, 422 U.S. 490 (1975).

ARGUMENT

I. THE SUBSTANTIVE ESTABLISHMENT CLAUSE QUESTION PRESENTED BY THIS CASE IS NOT WORTHY OF CERTIORARI.

The substantive constitutional question presented by this case – whether the Board's resolution violated the Establishment Clause – is not worthy of

certiorari for at least four reasons: (1) the ruling below created no substantive Establishment Clause law, because only three of the eleven members of the en banc court opined that the resolution was constitutional; (2) the three-judge opinion does not, in any event, conflict with any other Establishment Clause decision; (3) the legal question presented by this case is unlikely to recur, and its unusual facts make it the worst possible vehicle for the creation of a new Establishment Clause test; and (4) in any event, Judge Silverman and his two colleagues were right to conclude that a local legislature may speak out, even impolitely, when a religious actor attempts to influence secular policy outcomes within its jurisdiction.

A. The Ruling Below Created No New Establishment Clause Law.

Contrary to petitioners' dire predictions about the impact of the Ninth Circuit's "decision," the ruling below created no substantive Establishment Clause law. Because only three of the eleven members of the en banc court concluded the resolution was constitutional, their opinion has no binding effect, even within the Ninth Circuit. *See, e.g., Nevius v. Sumner*, 105 F.3d 453, 460 & n.6 (9th Cir. 1996) (plurality opinion of en banc court not binding precedent within the Ninth Circuit). In fact, Judge Silverman's opinion, with which petitioners take issue, has no greater precedential value than Judge Kleinfeld's opinion, with which petitioners agree. And because neither opinion is binding, substantive Establishment Clause

law is exactly the same – in the Ninth Circuit and elsewhere – as if petitioners had never filed their lawsuit.

This alone renders the case unworthy of certiorari. This Court's Rule 10 emphasizes at every turn that certiorari jurisdiction most commonly lies when a lower "court" has "decided" an important federal question. S.Ct. Rule 10(a), 10(b) & 10(c). The Ninth Circuit did not "decide" the question petitioners claim is so important. The only actual decision by the Ninth Circuit was that the district court did not err in dismissing the complaint. To be sure, this Court reviews judgments rather than opinions, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 & n.7 (1982), but the judgment should involve a "decision" on an important question of law. While this case may make for interesting discussion, it involves no substantive Establishment Clause decision at all, much less an important one.

B. The Three-Judge Opinion Does Not Conflict With Any Other Court Decision.

Even if Judge Silverman's opinion had been issued by a six-judge majority, it would have created no conflict with a decision of any other court. To establish such a conflict, petitioners must, at a minimum, identify a case in which a plaintiff alleged his government condemned his religion, and the court held that the government's speech violated the Establishment Clause. Petitioners do not identify such a

case, the opinions below did not identify one, and the City is aware of none.

Petitioners are thus relegated to arguing that Judge Silverman's opinion conflicts with cases arising from vastly different factual scenarios. Although they cite virtually every religion case on the books, they single out four: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Epperson v. Arkansas*, 393 U.S. 97 (1968). Pet. 19.

The first of these cases, *Lukumi*, was a Free Exercise case, not an Establishment Clause case. Far from involving nonbinding government speech, it involved the outright criminalization of animal slaughter practices, through an ordinance that was gerrymandered to ensure only members of the Santeria church could be prosecuted under it. 508 U.S. at 535-36. The second case, *Santa Fe*, involved a claim that a school policy allowing prayer at high school football games violated the Establishment Clause. 530 U.S. at 310-11. The third, *Edwards*, again did not involve nonbinding government speech, but rather a state statute that this Court held was designed "to restructure the science curriculum to conform with a particular religious viewpoint." 482 U.S. at 593. And the fourth, *Epperson*, similarly involved a statute that prohibited teachers, on pain of criminal penalty, from discussing the theory of evolution. 393 U.S. at 107. The Court's conclusions that the government violated the First Amendment on the facts of these

cases obviously do not conflict with an opinion that a local legislature did not violate the Establishment Clause when it passed a nonbinding resolution criticizing a religious leader for attempting to influence policy within that jurisdiction.

C. The Facts Of This Case Are Highly Unusual And Present No Important Or Recurring Question That Requires Resolution.

It is unsurprising that Judge Silverman's opinion conflicts with no other court decision, because the facts of this case are highly unusual. It is not often that all of the following events take place: (1) a religious leader attempts to influence policy in a specific jurisdiction; (2) he succeeds in doing so; (3) government officials in that jurisdiction speak out against the religious leader's actions; and (4) followers of the religious leader believe the government speech violates their rights and sue for a judicial declaration to that effect. This case simply does not involve a recurring or important legal question, much less a vexing or widespread problem in society, that would justify a grant of certiorari even absent a conflict among the courts. And because the facts are so unusual, this case could not provide a worse vehicle for reconsideration, as petitioners urge, of the entirety of this Court's Establishment Clause jurisprudence.

The overwhelming majority of Establishment Clause cases involve allegations by a plaintiff that

the government has favored religion – typically through a religious display, an invocation to which the plaintiff was subjected, or the expenditure of tax dollars in furtherance of some policy. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 689-91 (2005) (discussing primarily cases involving religious displays); *Santa Fe*, 530 U.S. at 310-13 (discussing primarily challenges to invocations at public gatherings); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-52 (2002) (discussing primarily cases involving expenditure of funds). When, in contrast, the government is alleged to have disfavored religion, the claim is almost invariably brought under the Free Exercise Clause, because the government has imposed an actual restriction on religious speech or conduct. *See, e.g., Lukumi*, 508 U.S. at 531 (reciting cases). In this case, a government entity has engaged in nothing more than speech, and the speech is alleged to disfavor religion. That type of First Amendment claim is almost nonexistent.[3]

Although instances in which pure government speech is alleged to disfavor religion are rare enough, that still does not fully capture this case's outlier

---

[3] The only three such cases of which the City is aware are *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005), *Am. Family Ass'n v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), and *Okwedy v. Molinari*, 150 F.Supp.2d 508 (E.D.N.Y. 2001) (Establishment Clause holding affirmed by *Okwedy v. Molinari*, 69 Fed.Appx. 482, 484-85 (2d Cir. 2003)). In all these cases, the courts rejected the argument that the government speech violated the Establishment Clause.

status in the Establishment Clause universe. It is one thing for the government, uninvited, to engage in speech that might be interpreted as hostile to religion. *See, e.g., O'Connor*, 416 F.3d at 1219 (display of sculpture invoking allegations of priest abuse). It is quite another thing where, as here, a religious leader reaches out to a jurisdiction in an attempt to influence policy, uses controversial language to do so, actually succeeds in changing the policy, and the legislative body of that jurisdiction responds with speech of its own but takes no regulatory action. That kind of case has never come up before. It may never come up again. It is a singularly poor vehicle to revisit this Court's entire Establishment Clause jurisprudence.[4]

D. Judge Silverman's Three-Judge Opinion Correctly Applied The Law To The Unusual Facts Of This Case.

Even though Judge Silverman's opinion did not garner a majority, the result reached by the Ninth Circuit (affirmance of dismissal of the complaint) was

---

[4] Nor, in any event, is petitioners' proposed replacement for the *Lemon* test reasonable – it appears heavily to favor the rights of the Judeo-Christian majority over religious minorities, which directly contravenes the Establishment Clause's central goal of preventing the government from prescribing what is orthodox. For example, petitioners' proposed test appears to demand that courts apply rational basis review to a legislative statement that "one God exists," but strict scrutiny to a legislative statement that "more than one God exists." Pet. 18-19.

correct for the reasons he stated. The Establishment Clause does not permit courts to assess government conduct from the perspective of someone who is ignorant of the context in which it occurs. The Clause presumes an observer "familiar with the history of the government's actions and competent to learn what history has to show." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 866 (2005). An observer familiar with San Francisco's efforts to promote lesbian and gay equality – especially the Board's prior resolutions – would know the Board did not care whether the discrimination was being done by a religious or secular leader. The observer would understand that the Board would have responded in exactly the same way had a powerful international *secular* organization that does charitable work (say, the Bill and Melinda Gates Foundation) announced it would only support programs in San Francisco that discriminate on the basis of sexual orientation. Moreover, an observer familiar with the timing of the resolution would understand that the Board spoke out, not in response to a statement of doctrine put out by the Congregation of the Doctrine of the Faith in 2003, but in response to the specific and controversial attempt in 2006 to influence outcomes on a secular issue of great importance to the people of San Francisco. Finally, the observer would know that the resolution was accompanied by no regulation, and that the City made no effort to disseminate the resolution beyond its normal placement with all other resolutions on the City's website.

Judge Kleinfeld's competing three-judge opinion assumed government officials have no right to respond to such conduct by a religious leader. It argued that the Establishment Clause limits legislative bodies to general statements of policy – that government officials may not specifically respond to the actions of religious groups on matters of civic concern. Pet. App. 23a (arguing that every aspect of the resolution violated the constitution other than the sentence, "[s]ame-sex couples are just as qualified to be parents as heterosexual couples."). However, if a religious group dedicates itself to influencing policy on a secular issue, it must be presumed to have the fortitude to withstand the criticism that inevitably comes from being an active participant in this arena. If, for example, a religious group launched a campaign to convince judges to vote against the death penalty, it could not be heard to complain of criticism by proponents of the death penalty within the government. If a religious group called for terrorist acts within the United States, surely its members could not challenge the constitutionality of a harsh rebuke from the President in a State of the Union address. That a person's policy objectives in the secular arena happen to be driven by religious belief is not a reason to treat him differently. *Cf. McGowan v. Maryland*, 366 U.S. 420, 442 (1961) ("the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly

apart from any religious considerations, demands such regulation"); *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988) ("On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive Adolescent Family Life Act funding will agree with the message that Congress intended to deliver . . . is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion.")

Judge Kleinfeld's approach also gives short shrift to the notion that legislators have their own right to speak out on matters affecting the people they represent. "Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process." *Keller v. State Bar of California,* 496 U.S. 1, 12 (1990); *see also Bond v. Floyd*, 385 U.S. 116, 135-36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."). To be sure, government speech is limited at some point by the Establishment Clause, but in determining where that limit lies, Judge Silverman's opinion was right to be solicitous of

legislators' interests in speaking out on matters of secular concern, and Judge Kleinfeld's opinion was wrong to brush aside those interests.[5]

In sum, the only workable approach to this highly unusual Establishment Clause question is that taken by Judge Silverman, whose opinion correctly applied the *Lemon* test to conclude the resolution's primary purpose and effect was not to denounce religion, but to respond to a controversial and successful attempt to affect the lives of San Franciscans in the secular arena.

II. THE NINTH CIRCUIT'S DECISION ON STANDING IS NOT WORTHY OF CERTIORARI.

Petitioners prevailed on the question of standing below and accordingly do not seek certiorari on it. The City argued below, and continues to agree, that petitioners had standing. For standing purposes, it must be assumed, as incorrectly alleged by

---

[5] Although petitioners and Judge Kleinfeld do not propose this, one could imagine an argument that although religious actors in the policy arena should not enjoy complete immunity from governmental criticism, there should be some limit on *how* officials may address them. This approach, however, would do little more than thrust judges into the role of "Miss Manners," policing the etiquette but not the content of public officials' criticisms of people who advance policy goals in the name of their religion. Worse, the result would be the emergence, through case law, of a confusing code of speech that officials would be forced to consult before speaking out.

petitioners, that the resolution was a denunciation of the Catholic religion. *See, e.g., In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008). A Catholic resident of the City must have standing to challenge an official resolution denouncing his religion, just as a non-Catholic resident must have standing to challenge a resolution proclaiming Catholicism the official religion of San Francisco. A contrary conclusion would insulate government officials from suit even when they violate the Establishment Clause at its very core, by "establishing" an official religion.

In any event, as acknowledged even by Judge Graber's opinion, the conclusion that petitioners had standing created no conflict with the decision of another court. Rather, the case presented a standing question that defied categorization, could be compared only to cases involving noticeably different facts, and may never again come before the federal judiciary.

Judge Graber opined that the facts of this case were close enough to those of *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982), to warrant a conclusion that jurisdiction was lacking. But *Valley Forge* involved an advocacy organization's challenge to a transfer of property to a religious organization. This Court held that the members of the organization were nothing more than "concerned bystanders" who "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence

presumably produced by observation of conduct with which one disagrees." *Id.* at 473, 485. Judge Graber's discussion of the differences between this case and *Valley Forge* was more convincing than her discussion of their similarities, and at a minimum it demonstrates there is no conflict with *Valley Forge*:

> In some ways, Plaintiffs' allegations evince a much stronger connection to the challenged governmental action. . . . The plaintiffs in *Valley Forge* had never visited, and had no other connection to, the land in question. Here, Plaintiffs reside in San Francisco, and Defendants operate as the San Francisco municipal government. . . . Additionally, Plaintiffs view the resolution as a direct attack on their specific religion: Catholicism. There may be some stronger connection to the challenged government action when the action is perceived as a direct attack on one's own religion, as distinct from a more general offense that the government is condoning or conveying religious messages with which one generally disagrees or to which one does not adhere. I acknowledge that Plaintiffs' residency and their perception of the government action as attacking their specific religion distinguish this case in significant ways from the Supreme Court's *Valley Forge* decision.

Pet. App. 67a. In sum, the connection between the plaintiffs and the government action in this case was

more direct, and the alleged injury was more tangible, than in *Valley Forge*.[6]

There is also no conflict between this case and the religious display cases discussed by Judge Graber. As she recognized, those cases, which tend to require that a plaintiff allege "frequent and regular" contact with a display to achieve standing, are only comparable by analogy. Pet. App. 74a (quoting, among others, *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1252 (9th Cir. 2007)). And the analogy is a loose one, because while those offended by religious displays may be made to feel like outsiders, a plaintiff whose religion is officially denounced by his legislature is the direct target of religious discrimination. Although his actual contact with the resolution is more attenuated, the alleged injury is heightened, and far more specific to the plaintiff.

---

[6] In the same way, there is no conflict between the Ninth Circuit's jurisdictional conclusion below and the decisions Judge Graber cited as similar to *Valley Forge*, namely, *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010), *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007, 1016-17 (9th Cir. 2010), *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008), and *Flora v. White*, 692 F.2d 53, 54 (8th Cir. 1982). In those cases, the courts held the plaintiffs lacked standing because they alleged an injury no different from that suffered by any other member of the public who objected to the government policy at issue. *See, e.g.*, *Navy Chaplaincy*, 534 F.3d at 764 ("under plaintiffs' standing theory any recipient of the Navy's 'message' in this case, including the judges on this panel, would have standing to bring suit challenging the allegedly discriminatory Chaplain Corps.").

Finally, the complaint alleged that petitioners also had standing as taxpayers who objected to the use of government resources to pass the resolution. However, petitioners never presented this argument to the Ninth Circuit, and no judge below opined that petitioners had taxpayer standing. Judge Kleinfeld's opinion did not address the question, and Judge Graber's opinion briefly explained why taxpayer standing was lacking. Pet. App. 82a. Accordingly, this Court's pending decision in *Arizona Christian School Tuition Org. v. Winn*, No. 09-987 will have no bearing on this case.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Dated: March 25, 2011

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Counsel of Record
CHRISTINE VAN AKEN
Deputy City Attorneys

185

(3)

Supreme Court, U.S.
FILED
APR 6 - 2011
OFFICE OF THE CLERK

No. 10-1034

In the Supreme Court of the United States

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, DR. RICHARD SONNENSHEIN, and VALERIE MEEHAN,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN, in his official capacity as President, Board of Supervisors for San Francisco, and TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors for San Francisco,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001
rmuise@thomasmore.org

Attorney for Petitioners

April 6, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT IN REPLY 1

ARGUMENT IN REPLY 3

I. THE CHALLENGED RESOLUTION, WHICH REPRESENTS AN OFFICIAL POSITION OF THE CITY ON A MATTER OF CATHOLIC DOCTRINE, CONVEYS THE UNMISTAKABLE MESSAGE OF HOSTILITY TOWARD THE CATHOLIC RELIGION. 3

II. RESPONDENTS' BRIEF HIGHLIGHTS THE FLAWED DOUBLE STANDARD THAT EXISTS UNDER THE COURT'S CURRENT JURISPRUDENCE AND THE COGNIZABLE INJURY INVOLVED IN THIS CASE, WHICH COMPEL THIS COURT TO GRANT REVIEW.. 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,
483 U.S. 327 (1987) 3

Cnty. of Allegheny v. ACLU,
492 U.S. 573 (1989) 3, 6

Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church,
344 U.S. 94 (1952) 5

Larson v. Valente,
456 U.S. 228 (1982) 3

Lynch v. Donnelly,
465 U.S. 668 (1984) 1, 3

McCreary Cnty. v. ACLU of Ky.,
545 U.S. 844 (2005) 3, 6

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 6

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 7

Trunk v. City of San Diego,
629 F.3d 1099 (9th Cir. 2011) 6

Van Orden v. Perry,
545 U.S. 677 (2005) 2

STATEMENT IN REPLY

While the United States Constitution does not require a complete separation of church and state, according to this Court, "it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), including, one must assume, the Catholic religion. Respondents ignore this clear constitutional command and offer an untenable justification for adopting an official resolution that expressly and in stark terms condemns the Catholic Church, Catholic religious leaders, and Catholic religious beliefs.

More important, perhaps, for purposes of deciding whether the Court should grant review of this case is the fact that Respondents' very own arguments and the procedural history of this case belie Respondents' claim that this case presents "no important or recurring question that requires resolution." Resp. Br. at 19.

Indeed, this case comes to this Court only after the Ninth Circuit granted Petitioners' request for rehearing *en banc* and affirmed the lower court in an exceedingly fractured decision, with *three* judges finding that Petitioners had standing and should prevail on the merits, *three* judges finding that Petitioners had standing and should not prevail on the merits, and *five* judges finding that Petitioners lacked standing and thus did not reach the merits of the Establishment Clause claim.

Unfortunately, the troubling outcome of this case was made possible by the unintelligibility of this

Court's Establishment Clause jurisprudence. The conflict between the judges on the Ninth Circuit, let alone the conflict that is found across the federal circuit courts in general, *see, e.g.*, Pet. at 9-11, amply demonstrates that the Court's extant jurisprudence is incapable of consistent application, and, therefore, provides no standard whatsoever. In fact, as this case and Respondents' arguments demonstrate, *see* Resp. Br. at 19-20, this flawed jurisprudence unfortunately permits a double standard that perpetuates a regrettable perception that the Establishment Clause is hostile toward religion.

In sum, this Court should grant review of this case and abandon its unworkable tests in favor of a view of the Establishment Clause that produces results consistent with our Nation's religious heritage—a view which underlies the First Amendment itself. As Justice Thomas noted in his concurring opinion in *Van Orden v. Perry*, "The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. . . . [A] more fundamental rethinking of our Establishment Clause jurisprudence remains in order." *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring). Petitioners respectfully submit that this case provides an ideal opportunity for this Court to fundamentally rethink its jurisprudence and to provide much needed guidance to the courts below that is capable of consistent and evenhanded application.

ARGUMENT IN REPLY

I. THE CHALLENGED RESOLUTION, WHICH REPRESENTS AN OFFICIAL POSITION OF THE CITY ON A MATTER OF CATHOLIC DOCTRINE, CONVEYS THE UNMISTAKABLE MESSAGE OF HOSTILITY TOWARD THE CATHOLIC RELIGION.

According to this Court, the Establishment Clause prohibits "practices suggesting 'a denominational preference.'" *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) (stating that "strict scrutiny" applies in such cases) (citation omitted); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). This constitutionally-mandated neutrality is allegedly violated when either the "purpose" or the "effect" of the "practice under review . . . conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor J., concurring in the judgment); *see McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.") (internal quotations and citation omitted); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) ("*Lemon*'s 'purpose' requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting [or disapproving] a particular point of view in religious matters.").

Consequently, it is utterly disingenuous to ignore, as Respondents do, the plain language of the resolution, *which speaks on behalf of the City*. The plain language describes a Catholic religious doctrine duly communicated by the organization of the Catholic Church in charge of clarifying such doctrine as "hateful," "defamatory," "insulting," "callous," and "discriminatory," and showing "insensitivity and ignorance." The plain language describes the Catholic Church as a hateful foreign meddler in San Francisco's affairs. The plain language demands that the Catholic Church "withdraw" its religious directive and calls for the local archbishop to defy his superior's directive. Indeed, the plain language of the resolution even goes so far as to rekindle an old anti-Catholic bigotry by referring to the Congregation for the Doctrine of the Faith as the "formerly known . . . Holy Office of the Inquisition." Pet. App. at 5a-6a. These are not "isolated statements," as Respondents suggest.[1] *See* Resp. Br. at 8. Rather, these statements exemplify the purpose and effect of this resolution: an official denunciation of the Catholic Church because of its particular religious beliefs.

Indeed, it is perhaps worth reminding this Court that the "directive" that resulted in this official condemnation by government officials was not, as Respondents mischaracterize it, "the Vatican's attempt to influence policy within San Francisco." Resp. Br. at 12. Rather, the directive was issued from the

---

[1] Respondents' argument is akin to asking the Court to ignore the written commandments when reviewing a challenge to a Ten Commandments display or to ignore Jesus, Mary, and Joseph when reviewing a challenge to a crèche display.

Congregation for the Doctrine of the Faith to Catholic Charities, a Catholic organization. As a result, the challenged resolution is a *direct* interference by the government in the affairs of the Catholic Church. It is difficult to conceive of a more egregious violation of the Establishment Clause. *See generally Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (stating that the First Amendment expresses "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

Moreover, this case does not present a situation in which legislators were merely exercising their "right to speak out on matters affecting the people they represent." Resp. Br. at 24. The challenged resolution represents an official position of the City on a question of Catholic religious doctrine. If the law were as Respondents suggest, then a legislator could exercise his "right to speak" by displaying a crèche on government property during Christmas or a Latin Cross during Easter, particularly if his constituents were Christian, or a Menorah during Hanukah if he represented a largely Jewish community. The fact that some people in San Francisco—even a majority of the people—might be virulently anti-Catholic does not immunize the City when it takes an official position that conveys this sentiment.

In sum, Respondents have offered no principled explanation under this Court's extant Establishment Clause jurisprudence as to how (or why) the Constitution could (or should) permit the government

to convey an *express* message of disfavor of the Catholic Church through an official resolution as in this case, but then prohibit an *implied* message of favor toward religion through other government practices, such as the passive display on government property of the crèche, a cross, or the Ten Commandments—practices which are routinely held unconstitutional by this and other courts in countless other cases. *See, e.g., McCreary Cnty.*, 545 U.S. at 844 (striking down a Ten Commandments display); *Cnty. of Allegheny v. ACLU,* 492 U.S. 573 (1989) (striking down the display of a crèche); *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (striking down the display of a cross that is part of a national war memorial). Indeed, there is no principled explanation, only an obvious conclusion: the Court's jurisprudence is in "hopeless disarray," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring in the judgment), and in need of "[s]ubstantial revision," *Cnty. of Allegheny,* 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part).

II. RESPONDENTS' BRIEF HIGHLIGHTS THE FLAWED DOUBLE STANDARD THAT EXISTS UNDER THE COURT'S CURRENT JURISPRUDENCE AND THE COGNIZABLE INJURY INVOLVED IN THIS CASE, WHICH COMPEL THIS COURT TO GRANT REVIEW.

Respondents make the following relevant (and quite telling) observation and argument:

> The overwhelming majority of Establishment Clause cases involve allegations by a plaintiff that the government has favored religion –

> typically through a religious display, an invocation to which the plaintiff was subjected, or the expenditure of tax dollars in furtherance of some policy. . . . When, in contrast, the government is alleged to have disfavored religion, the claim is almost invariably brought under the Free Exercise Clause, *because the government has imposed an actual restriction on religious speech or conduct*. . . . In this case, *a government entity has engaged in nothing more than speech*, and the speech is alleged to disfavor religion. That type of First Amendment claim is almost nonexistent.

Resp. Br. at 19-20 (emphasis added).

Whether intended or not, Respondents' argument highlights the unprincipled double standard that currently exists under the Court's flawed jurisprudence. This Court has never required a plaintiff to show that "the government has imposed an actual restriction" on him before it has struck down a challenged government practice that allegedly favors a particular religion. Indeed, in the vast majority of cases in which an Establishment Clause violation was found "a government entity has engaged in nothing more than speech," whether that be the passive display of a religious symbol on government property or less, simply *permitting* a student-led, non-denominational prayer at a high school football game, *see, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down a policy that permitted student-led, student-initiated prayer at high school football games).

Respondents provide further support for granting review of this case in their argument on standing. As noted, "The City argued below, and continues to agree, that petitioners had standing" to challenge the resolution at issue. Resp. Br. at 25. As Respondents correctly argued:

> For standing purposes, it must be assumed, . . . that the resolution was a denunciation of the Catholic religion. . . . A Catholic resident of the City must have standing to challenge an official resolution denouncing his religion, just as a non-Catholic resident must have standing to challenge a resolution proclaiming Catholicism the official religion of San Francisco. A contrary conclusion would insulate government officials from suit even when they violate the Establishment Clause at its very core, by "establishing" an official religion. . . . [W]hile those offended by religious displays may be made to feel like outsiders, a plaintiff whose religion is officially denounced by his legislature is the direct target of religious discrimination. Although his actual contact with the resolution is more attenuated, the alleged injury is heightened, and far more specific to the plaintiff.

Resp. Br. at 25, 26, 28.

Thus, as Respondents acknowledge here, a citizen of San Francisco suffers a cognizable injury under the Establishment Clause if the City passes "an official resolution denouncing his religion." Consequently, in direct contravention to their earlier argument, Respondents acknowledge that the City need not

"impose[] an actual restriction" on Petitioners for them to have suffered this constitutional injury, which would apparently distinguish this Establishment Clause case from a case arising under the Free Exercise Clause.

At the end of the day, the mental gymnastics that Respondents must engage in to fit the outcome of this case within some established legal framework illustrates all too well the fundamental flaws of that framework and compel this Court to grant review of this case.

CONCLUSION

As this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and abandon its unworkable tests in favor of a standard that is consistent with our Nation's religious heritage and capable of consistent application.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001
rmuise@thomasmore.org